

COURT OF COMMON PLEAS

BUTLER COUNTY, OHIO

2010 JAN -8 PM 2:41

FILED BUTLER CO. CLERK OF COURT

STATE OF OHIO,

Plaintiff,

Case No. CR-1983-12-0614

CA -09-10-263

vs.

HONORABLE ANDREW NASTOFF

HONORABLE KEITH SPAETH

HONORABLE CHARLES PATER

VON CLARK DAVIS,

Defendant.

ORIGINAL

FILED BUTLER CO. COURT OF APPEALS

JAN 08 2010

CANDY CARPENTERS CLERK OF COURT

IMAGED

MITIGATION HEARING

TRANSCRIPT OF PROCEEDINGS

September 10, 2009

VOLUME III

JILL M. CUTTER, RPR  
(513) 785-6596

(21)

1 APPEARANCES:

2  
3 On behalf of the plaintiff:

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6 11th Floor  
7 315 High Street  
8 Hamilton, Ohio 45011

9 and  
10 DANIEL G. EICHEL, ESQ.  
11 Assistant Butler County Prosecuting Attorney  
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15 On behalf of the defendant:

16 MELYNDA COOK-REICH, ESQ.  
17 Repper, Pagan, Cook  
18 1501 First Avenue  
19 Middletown, Ohio 45044  
20 and

21 RANDALL PORTER, ESQ.  
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## Transcript of Proceedings

## Morning Session

- - - - -

JUDGE NASTOFF: We are back on record in State of Ohio vs. Von Clark Davis, CR1983-12-0614. The record will reflect that the defendant, Von Clark Davis, appears personally with his counsel, Randall Porter and Melynda Cook-Reich. Also present on behalf of the State of Ohio are Assistant Prosecutors Dan Eichel and Michael Oster and then all three members of the three-judge panel are present, myself, Judges Pater and Spaeth. Good morning to everyone.

When we left off yesterday, we were still hearing evidence from the defense and it was communicated to us that you had additional testimony or evidence that you wish to proceed with this morning. And are you prepared to do that at this time?

MR. PORTER: We are, Your Honor. We do have one brief housekeeping matter if we could address up front.

JUDGE NASTOFF: Yes, sir.

MR. PORTER: And it is addressing mainly to you Judge Nastoff since you were involved in the preliminary proceedings in this matter. The Court was nice enough to approve an out-of-state subpoena for Delbert Flowers, the Court last Thursday when we were

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1 here also authorized the auditor's office to issue a 10:15:37  
2 check, so it would be a valid subpoena. We found out 10:15:41  
3 at a very late time that on Tuesday morning that Mr. 10:15:45  
4 Flowers was in the hospital and he is now home, but is 10:15:49  
5 on IV permanently. For that reason we will not be able 10:15:53  
6 to call him. I just wanted the record to be clear that 10:15:57  
7 the Court didn't believe that there was some other 10:16:00  
8 reason that we had you go through the formality of 10:16:02  
9 issuing the subpoena, and then failed to bring the 10:16:06  
10 person in. 10:16:09

11 JUDGE NASTOFF: All right. Well, I appreciate you 10:16:10  
12 supplementing the record with that information. 10:16:14  
13 Anything else we need to take up then at this time? 10:16:17

14 MS. COOK-REICH: No, Your Honor. 10:16:20

15 JUDGE NASTOFF: All right. You may call your 10:16:21  
16 first witness of the day. 10:16:23

17 MS. COOK-REICH: Rick Rotundo. 10:16:25

18 RICK ROTUNDO 10:16:31

19 having been first duly sworn, was examined and testified under 10:16:31  
20 oath as follows: 10:16:59

21 JUDGE PATER: Before we go any further, let me put 10:16:59  
22 on the record again as I did with Victor Davis 10:17:01  
23 yesterday. I don't know Rick Rotundo very well. I 10:17:04  
24 know his brother, Jerry and his little sister Debbie. 10:17:09  
25 I know the two of them quite well and I know the 10:17:15

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1 Rotundo family, and I recall the Rotundo family and the 10:17:17  
2 Davis family lived side by side on Ludlow I believe, 10:17:21  
3 for at least some time in '60s. Once again, I don't 10:17:24  
4 think that my somewhat distant knowledge of Mr. Rotundo 10:17:27  
5 would have anything to do with my assessment of the 10:17:32  
6 evidence here, my ability to rule on the case, my 10:17:34  
7 ability to assess Mr. Rotundo's statements and 10:17:39  
8 testimony today. Does anybody want to voir dire me 10:17:43  
9 further on that? 10:17:47

10 MS. COOK-REICH: No, Your Honor. 10:17:48

11 MR. OSTER: No. 10:17:50

12 MR. EICHEL: No, Your Honor. 10:17:51

13 JUDGE NASTOFF: All right. Thank you. You may 10:17:52  
14 proceed. 10:17:54

15 DIRECT EXAMINATION 10:17:54

16 BY MS. COOK-REICH: 10:17:54

17 Q. For the record can you state your name, please? 10:17:54

18 A. Patrick Michael Rotundo. I go by the name of 10:17:56  
19 Rick. 10:18:00

20 Q. And your address? 10:18:00

21 A. [REDACTED] Loveland, Ohio. 10:18:02

22 JUDGE NASTOFF: And sir, could you slide the 10:18:06  
23 microphone just a little bit closer? 10:18:08

24 THE WITNESS: Sure. 10:18:10

25 Q. (BY MS. COOK-REICH) And what is your date of 10:18:11

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1	birth?	10:18:12
2	A. [REDACTED]	10:18:13
3	Q. Do you know the gentleman seated here to the right	10:18:17
4	in the green plaid shirt?	10:18:21
5	A. Yes, I do.	10:18:23
6	Q. And who is he?	10:18:24
7	A. Von Clark Davis. We knew each other as -- I call	10:18:26
8	him Red.	10:18:29
9	Q. He calls you Rick and you call him Red?	10:18:30
10	A. Yes.	10:18:32
11	Q. You have lived next to the Davis family at some	10:18:32
12	point in time in your life; is that correct?	10:18:36
13	A. Yes, I would say from like '64 'til about 1970.	10:18:37
14	Q. Okay. So, if you moved, or you lived next to him	10:18:41
15	in 1964 how old would you have been?	10:18:45
16	A. Sixteen.	10:18:47
17	Q. Okay. And Red would have been a couple of years	10:18:48
18	older than yourself?	10:18:52
19	A. I would think so, yes.	10:18:53
20	Q. You were familiar with the Davis family?	10:18:55
21	A. Very much so.	10:18:59
22	Q. Okay. Were you present in the Davis household on	10:19:00
23	occasion?	10:19:05
24	A. We were -- it was like my second family.	10:19:05
25	Q. Okay. Can you describe who was living in the	10:19:09

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1 household at that point in time, I guess you are 16, Red is 10:19:12  
2 18, what other family members are present? 10:19:15  
3 A. In their home? 10:19:18  
4 Q. Yes. 10:19:19  
5 A. Charles Tipton, who was the patriarch, I guess, 10:19:20  
6 and Alluster Tipton was the mother, and there were several 10:19:26  
7 offspring, Charles Davis, Victor Davis, Elliot Davis, and I 10:19:31  
8 think we call Tip, Mr. Tipton, we called him Tip, he had a 10:19:36  
9 couple biological children with Alluster, I don't remember 10:19:41  
10 their names. And it was kind of an extended family. There 10:19:45  
11 were always friends and relatives and there were always people 10:19:49  
12 in the home. 10:19:55  
13 Q. When did you move away from that area or stop 10:19:57  
14 living in that area? 10:20:02  
15 A. As I recall, I think it was in 1970 or -- 1970 10:20:03  
16 late 1970, my family moved to [REDACTED] and I moved with 10:20:09  
17 them. 10:20:13  
18 Q. Okay. So for about six years you lived next to 10:20:13  
19 the Davis family? 10:20:16  
20 A. Yes. 10:20:17  
21 Q. Can you give some insight into the usage of 10:20:17  
22 alcohol in the home? 10:20:23  
23 A. Well, I can say this: As a young man, I think 10:20:24  
24 back then we were allowed to drink when we were 18. I was 10:20:28  
25 raised Italian and I played by the rules, but there were 10:20:33

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1 always people there, elders whether they were aunts, uncles, 10:20:35  
2 whatever, there was always beer, people would have drinks here 10:20:41  
3 and there, but to me, considering the time particularly in the 10:20:44  
4 late '60s, I would say that drinking was part of the culture. 10:20:49  
5 It was never -- I never saw any severe excess, or I mean, 10:20:56  
6 outside of New year's Eve and things of that nature, but I 10:20:59  
7 would consider by today's standards reasonable based on the 10:21:03  
8 circumstances. 10:21:06

9 Q. Okay. Did you have an occasion to drink with Red? 10:21:07

10 A. Yes, absolutely. Particularly on New Year's Eve, 10:21:11  
11 on special occasions, birthdays, but it was always in a social 10:21:14  
12 context, and there was always some form of parental oversight. 10:21:17  
13 It was all a very, I guess you would say civil, controlled 10:21:24  
14 situation for the most part. 10:21:29

15 Q. Okay. Would you ever have characterized it 10:21:30  
16 something similar to the Animal House? 10:21:36

17 A. From a social standpoint, no, because so many of 10:21:38  
18 the people involved were either poverty stricken, very poor 10:21:43  
19 education, low social status and there was always a sense of 10:21:48  
20 being thankful for what you had. The drinking I think was as 10:21:53  
21 much an escape. I never saw any violence or any kinds of 10:21:55  
22 extreme behavior. And Charles Tipton, the patriarch, always 10:21:59  
23 made sure that, particularly the males were well behaved and I 10:22:03  
24 learned quite a bit as a result of his oversight, not quite 10:22:07  
25 Animal House I don't think. 10:22:10

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1 Q. Okay. Do you recall a bar on the corner where 10:22:11  
2 locals would go? 10:22:15

3 A. Well, yes. There was an Amvet on the corner that 10:22:16  
4 the veterans would go to and then there was a tavern at the 10:22:19  
5 end of the street at Maple Avenue which I think was Master's 10:22:24  
6 Tavern that was open to everybody, and I guess it was Maple, 10:22:29  
7 but we never ever frequented bars there in that vicinity. 10:22:35

8 Q. Okay. Do you recall the particular way that 10:22:39  
9 people would fill up just of beer at one of those local 10:22:43  
10 taverns? 10:22:47

11 A. Yeah. Yes. The old Italians particularly, I can 10:22:47  
12 remember as a child, I lived -- I was born on [REDACTED] 10:22:51  
13 In 1948 and we moved in '57 then we came back to [REDACTED] 10:22:55  
14 in '63, but even as the demographics changed in 1965, '66 it 10:23:02  
15 was very common to see, there were a few, like, apartments 10:23:08  
16 people would take the jug to the Amvets with the hose and they 10:23:12  
17 would get their gallons of beer and that was a very common 10:23:16  
18 sight, but it was never anything that I thought was abusive, 10:23:19  
19 it was part of the culture at the time. 10:23:22

20 Q. Okay. And you used the word demographics. When 10:23:23  
21 you resided in [REDACTED] next to the Davis family for that 10:23:27  
22 six year time period, what could you tell me about the race 10:23:30  
23 makeup of the neighborhood? 10:23:33

24 A. Well, originally there were old Italian, German 10:23:35  
25 traditional families, and then you had an influx of 10:23:40

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1 Appalachian culture, then we saw an influx of, I would say you 10:23:42  
2 know, sporadic situations where you had black families in the 10:23:45  
3 mid-1960s, and for lack of a better word, I guess as the old 10:23:49  
4 timers died off, their homes were sold and there was clearly a 10:23:55  
5 shift demographically as far as the population was concerned 10:24:00  
6 and for lack of a better word the neighborhood kind of went 10:24:03  
7 downhill significantly as each year passed. 10:24:06

8 Q. Could you tell me what that meant in regards to 10:24:10  
9 race, residential area? 10:24:14

10 A. Well, clearly there were pockets of racism, there 10:24:15  
11 were pockets of anger and apathy just based on people being 10:24:19  
12 uneducated, poor. There were also a lot of transient families 10:24:24  
13 in the apartments. And as far as race relations, I personally 10:24:27  
14 got along with everybody. I never really saw any real hatred. 10:24:32  
15 It was kind of the code of the road, people respected each 10:24:35  
16 other, and for the most part back then, you don't see the -- I 10:24:38  
17 didn't see the kinds of things then that I see now. While the 10:24:43  
18 neighborhood started to look scary, I always felt safe there. 10:24:47

19 Q. Was your family the only white family? 10:24:51

20 A. No. No. I would say -- 10:24:54

21 JUDGE NASTOFF: Excuse me, I don't mean to 10:24:55  
22 interrupt, can you slow down just a little bit for the 10:24:57  
23 court reporter? 10:25:01

24 THE WITNESS: I'm sorry. 10:25:03

25 JUDGE NASTOFF: No, not at all. Thank you. 10:25:04

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1 || A. would you please ask that again? 10:25:09

2	Q. Who knows what I asked. The reason I asked you,	10:25:09
3	you said the neighborhood began to look scary, what do you	10:25:11
4	mean by that?	10:25:13

5	A. People typically did not take care of their	10:25:14
6	property. In many cases, you had single mothers, I would	10:25:17
7	guess who had multiple visitors, children ran around, they	10:25:21
8	didn't seem to be well cared for, and I do recall when I	10:25:25
9	started college I worked at Nicolette Industries and they had	10:25:30
10	brought in a lot of Hispanic families, who didn't even speak	10:25:34
11	English, so culturally the neighborhood in 1966, '67 changed	10:25:37
12	dramatically because you had the beginning of Hispanic	10:25:42
13	influence and I would say that for the most part the	10:25:46
14	neighborhood was white.	10:25:49

15	Q. Okay. Did -- do you recall a time when Von moved	10:25:49
16	away from the Ludlow area to be near his father?	10:25:55

17	A. To be very honest, my relationship with Red at the	10:25:57
18	time was, you know, we were like brothers. We didn't talk a	10:26:03
19	whole lot about family or extended family or I never heard	10:26:08
20	much about his father. Just out of respect I didn't think it	10:26:13
21	was my business to delve into the those matters because in	10:26:16
22	many cases it was very common for the kids to have different	10:26:20
23	fathers with the same mother. I do remember when he went to	10:26:25
24	the Navy, I think that would have been about 1967, and he came	10:26:29
25	back from the Navy about 18 months later. And I mean, he was	10:26:35

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1 a little more articulate, a little brighter, had a lot of 10:26:42  
2 hands-on experiences, but for the most part, he used to go 10:26:45  
3 with me to the university -- I started at the University of 10:26:49  
4 Cincinnati, he would spend the day with me down there, and 10:26:51  
5 there would be times when he would go somewhere for a week or 10:26:56  
6 so at a time, but I never saw that as anything out of the 10:26:59  
7 ordinary. And his extended stay in the military was probably 10:27:03  
8 the longest time that I saw him be gone. I think around 1969 10:27:07  
9 perhaps even early 1970, he had gone to Washington DC, as I 10:27:13  
10 recall. I don't remember. He talked about working for waste 10:27:19  
11 collection or he worked there for a while and then he came 10:27:23  
12 back, but as the years progressed, our contact became a little 10:27:26  
13 less continual. 10:27:31

14 Q. Okay. Do you recall anything about the trip or 10:27:35  
15 the time that he spent in DC relative to his father? 10:27:38

16 A. Once again, not to sound stupid, I really didn't 10:27:41  
17 think it was my job -- remember the late '60s -- 10:27:46

18 Q. No, I don't. 10:27:51

19 A. Okay. I'm sorry. This wasn't something that I 10:27:52  
20 felt the need to kind of explore, because to me the family 10:27:55  
21 that I knew there, were wonderful people, and you know, we all 10:27:59  
22 have skeletons in our closet and I didn't know he was going to 10:28:03  
23 see his dad, as a matter of fact, I don't think his father was 10:28:07  
24 ever mentioned in our conversations. 10:28:09

25 MS. COOK-REICH: Okay. I have no further 10:28:11

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1	questions. Thank you.	10:28:13
2	JUDGE NASTOFF: Any cross-examination for this	10:28:14
3	witness?	10:28:15
4	MR. OSTER: Brief, Your Honor.	10:28:15
5	CROSS-EXAMINATION	10:28:15
6	BY MR. OSTER:	10:28:19
7	Q. Mr. Rotundo, my name is Michael Oster. I am	10:28:19
8	assistant prosecutor for the State of Ohio, I just want to ask	10:28:31
9	you a couple of questions. You referenced that yourself and	10:28:33
10	Von, you knew as Red, would drink sometimes together on New	10:28:36
11	Year's Eve, social occasions, correct?	10:28:43
12	A. Yes.	10:28:45
13	Q. Okay. And was he fun to be around at that point?	10:28:45
14	A. Absolutely. Back then we had a kind of code of	10:28:49
15	the road. We were men, we acted like men. We got respect	10:28:53
16	from others because we tried to stay in shape physically.	10:28:59
17	There was a pecking order in that culture, and the alcohol	10:29:02
18	pretty much when we would drink, you know, party, good times,	10:29:07
19	and there was never any escalation of anger or anything like	10:29:14
20	that. It was very social, very contained.	10:29:20
21	Q. Okay.	10:29:22
22	MR. OSTER: If I could have one moment.	10:29:26
23	JUDGE NASTOFF: Sure.	10:29:28
24	MR. OSTER: We have no further questions, Your	10:29:32
25	Honor.	10:29:33

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1	JUDGE NASTOFF: All right. Any redirect?	10:29:33
2	MS. COOK-REICH: No, Your Honor.	10:29:35
3	JUDGE NASTOFF: And again this witness can be	10:29:36
4	released permanently?	10:29:38
5	MS. COOK-REICH: Yes, he may, Your Honor.	10:29:39
6	JUDGE NASTOFF: All right. Sir, your testimony is	10:29:40
7	complete, you are released from any subpoenas and you	10:29:41
8	are free to go about your business. Thank you.	10:29:46
9	THE WITNESS: Thank you.	10:29:48
10	JUDGE NASTOFF: You may call your next witness.	10:29:50
11	MR. PORTER: We call Scott Nowack, Your Honor.	10:30:00
12	SCOTT NOWACK	10:30:02
13	having been first duly sworn, was examined and testified under	10:30:02
14	oath as follows:	10:30:57
15	JUDGE NASTOFF: You may proceed.	10:30:57
16	DIRECT EXAMINATION	10:30:57
17	BY MR. PORTER:	10:30:58
18	Q. Could you please state your name for the Judges?	10:30:58
19	A. Scott Nowack.	10:31:02
20	Q. Would you please spell your last name for the	10:31:04
21	court reporter?	10:31:07
22	A. N-O-W-A-K.	10:31:07
23	Q. Your work address, Mr. Nowack?	10:31:10
24	A. 878 Hoytsville Hubbard Road, Youngstown, Ohio,	10:31:13
25	44505.	10:31:23

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1	Q.	Currently employed, Mr. Nowack?	10:31:23
2	A.	Yes.	10:31:26
3	Q.	Could you tell the Judges where you are employed?	10:31:26
4	A.	I am employed at the Ohio State Penitentiary.	10:31:28
5	Q.	Do you hold a specific position there?	10:31:32
6	A.	Yes, I am employed as a correctional program	10:31:35
7		specialist.	10:31:39
8	Q.	Could you tell the Judges, please, what a program	10:31:40
9		specialist director is?	10:31:43
10	A.	We primarily perform daily case manager duties for	10:31:44
11		the inmates, includes visitation issues, daily issues the	10:31:49
12		inmates may have with the prison or their family, and in other	10:31:54
13		aspects preparing inmates for release and parole.	10:31:59
14	Q.	Mr. Nowack, how long have you held this position?	10:32:03
15	A.	I have been employed by the State for	10:32:06
16		approximately 13 years. And I have had this position about	10:32:09
17		ten years.	10:32:14
18	Q.	Is there a particular portion of the institution	10:32:14
19		in which you perform your duties?	10:32:20
20	A.	Half of my duties are with death row inmates, the	10:32:22
21		other half of my duties are with our Level 5 security inmates.	10:32:26
22	Q.	For the purposes of the Judges, could you explain	10:32:30
23		Level 5, Level 4 and things of that nature?	10:32:38
24	A.	Our State has a classification system. It's a	10:32:42
25		Level 1 through Level 5 classification system. One would be	10:32:48

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1 the lowest in a security level and 5 would be our highest. 10:32:53  
2 Level 1 what was formally known as minimum security, and Level 10:32:59  
3 5 being what was formally known as super max. Our death row 10:33:05  
4 doesn't really fall in a classification system. We define our 10:33:10  
5 death row more as a housing unit because inmates are not going 10:33:15  
6 to change classification levels on death row, they will be on 10:33:18  
7 death row. 10:33:23

8 Q. Since they do not fit within Level 1 through 5, 10:33:24  
9 could you compare their privileges, liberties with -- where 10:33:30  
10 they would fit within the 1 through 5 system? 10:33:37

11 A. If I had to compare -- if I had to make that 10:33:41  
12 comparison, I would say closer to Level 3 inmates. 10:33:46

13 Q. You have in front of you a notebook, sir. Could 10:33:51  
14 you please turn -- on the stand there, I'm sorry. Could you 10:33:59  
15 please turn to what would be Tab J in the notebook? Could you 10:34:04  
16 take a look for a minute and just study what is there in front 10:34:13  
17 of Tab J? 10:34:17

18 A. (Witness complies with request.) 10:34:19

19 MR. PORTER: If I might ask, do the Judges still 10:34:25  
20 have the exhibit notebooks? 10:34:26

21 JUDGE NASTOFF: Yes, we all have them. 10:34:29

22 Q. (BY MR. PORTER) Are you able to identify, yes or 10:34:32  
23 no, the document that is labeled Exhibit J in the notebook? 10:34:34

24 A. Yes. 10:34:39

25 Q. And could you tell the -- could you tell the 10:34:40

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1 three-judge panel or the Judges, excuse me, Your Honors, could  
2 you tell them what Exhibit J is?

3 A. It is an Institutional Summary Report I completed  
4 for Inmate Davis.

5 Q. I want to talk -- my next few questions are going  
6 to center just around the form itself. Is this a form that  
7 you created?

8 A. No, this is a common form that we use in the  
9 department, but I completed the information on the form.

10 Q. Do you know who created the form?

11 A. No. It's been around longer than me.

12 Q. Have you completed this form for other cases?

13 A. Numerous times, yes.

14 Q. And this particular case, can you tell the Judges  
15 how you completed the form? what the mechanics were of doing  
16 it?

17 A. We gather most of the information from what is  
18 called the inmate's unit file and then we also interview the  
19 inmate for program participation.

20 Q. In this particular case, was the interview done  
21 first of the inmate or was the review of the unit file done  
22 first?

23 A. Generally I notify the inmate that there is a  
24 request, interview them and then verify the information  
25 through the file.

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1 Q. Could you explain to the Judges what a unit file 10:36:06  
2 is? 10:36:09

3 A. A unit file primarily consists of some information 10:36:09  
4 over the inmate's course of incarceration such as their 10:36:16  
5 disciplinary record, visiting information, as well as program 10:36:21  
6 participation, and any type of classification changes, like 10:36:26  
7 security or job changes. 10:36:32

8 Q. Who maintains that file? 10:36:34

9 A. That file is maintained by unit staff which 10:36:37  
10 includes myself. 10:36:40

11 Q. I'm sorry, I didn't hear the last answer. 10:36:41

12 A. Unit staff which includes myself. 10:36:44

13 Q. And in this case, did you interview Mr. Davis? 10:36:46

14 A. Yes, I did. 10:36:51

15 Q. And in this case, did you attempt to verify the 10:36:53  
16 information that Mr. Davis gave you? 10:36:59

17 A. Yes, I did. 10:37:01

18 Q. Does your signature appear on the document itself? 10:37:03

19 A. Yes, on the second page. 10:37:11

20 Q. There are two signatures there. Could you help me 10:37:13  
21 at least? I am having a hard time reading the signatures. 10:37:18

22 A. Actually the second signature would be my 10:37:22  
23 supervisor Laura Johnson, but that is my signature because on 10:37:23  
24 that timeframe, I was acting on her behalf. 10:37:28

25 Q. But you were the one that actually reviewed the 10:37:31

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1	unit file?	10:37:35
2	A. That's correct.	10:37:36
3	Q. The date you signed the document?	10:37:36
4	A. April 27, 2009.	10:37:40
5	Q. Do you have contact with Mr. Davis himself?	10:37:46
6	A. Yes, I do.	10:37:56
7	Q. Have there been any events that you are aware of	10:37:57
8	since April 27 of 2009 that would cause this form to change?	10:38:01
9	A. No.	10:38:08
10	Q. I'm going to ask you some questions as they relate	10:38:09
11	to a different issue now. The way I understand it, the Ohio	10:38:15
12	State Penitentiary at Youngstown really has two separate	10:38:23
13	components or institutions or whatever the correct terminology	10:38:26
14	is; is that correct?	10:38:29
15	A. That is correct.	10:38:31
16	Q. Could you tell the Judges very briefly what -- and	10:38:33
17	is components the right term? Or tell the Judges what the	10:38:37
18	correct term is.	10:38:40
19	A. We have on our compound or our institution we	10:38:41
20	house primarily -- we have two separate main areas where we	10:38:45
21	house the inmates. One would be our Level 1 security	10:38:50
22	correctional camp, and then our other main building would	10:38:54
23	house Level 4, Level 5, and our death row population.	10:38:58
24	Q. Could you compare for the Judges in just numbers	10:39:04
25	the staffing components from the camp itself to the, if I can	10:39:09

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1 use the term, institution? 10:39:17

2 A. In relation to our correctional officer to inmate 10:39:19  
3 staff ratio, our correctional camp would have approximately 10:39:23  
4 four correctional officers supervising 220 inmates. Where the 10:39:29  
5 death row housing unit where Inmate Davis would have 10:39:36  
6 approximately six or seven correctional officers to 70 10:39:41  
7 inmates. 10:39:46

8 Q. Have you been involved with inmates that have been 10:39:47  
9 on death row and then received a sentence of less than death? 10:39:55

10 A. Yes, I have. 10:39:59

11 Q. Do those -- have those individuals transferred 10:40:00  
12 from an institution other than Ohio State Penitentiary at 10:40:05  
13 Youngstown? 10:40:11

14 A. Yes, they all have. 10:40:11

15 Q. Is there a security level that they generally -- 10:40:13  
16 or that they have transferred to in the past? 10:40:19

17 A. Yes, our department would classify them as a Level 10:40:21  
18 3 security level. 10:40:24

19 Q. Could you identify -- 10:40:27

20 JUDGE NASTOFF: Just hold on for a moment. All 10:40:33  
21 right, you may proceed, I just wanted to make sure 10:40:38  
22 there wasn't going to be any further interruption. 10:40:41

23 Q. (BY MR. PORTER) Could you identify for the Judges 10:40:43  
24 the Level 3 security institutions that those individuals have 10:40:45  
25 transferred to? 10:40:48

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1           A.    There are approximately five institutions, those           10:40:49  
2   being Toledo Correctional Institution, Torrumble Correctional           10:40:54  
3   Institution, Warren Correctional Institution, Mansfield           10:41:00  
4   Correctional Institution, and Ross Correctional Institution.           10:41:06

5           MR. OSTER: Your Honor, I think at this point I am           10:41:11  
6   going to object, I don't see what the relevance is to           10:41:13  
7   where they transfer or what that has to do with the           10:41:14  
8   individual nature and circumstances of Mr. Davis           10:41:18  
9   himself. So I would object to that and ask that to be           10:41:20  
10   stricken.           10:41:24

11           JUDGE NASTOFF: Relevance is, Mr. Porter?           10:41:24

12           MR. PORTER: I just have one additional question I           10:41:27  
13   could ask and I think that will tie it up, Your Honor.           10:41:29

14           JUDGE NASTOFF: All right. We will withhold           10:41:31  
15   ruling until you ask your question, go ahead.           10:41:33

16           Q.    (BY MR. PORTER) Are you able to tell the Judges           10:41:37  
17   the general staffing levels of those Level 3 institutions?           10:41:41

18           A.    They would have a -- you would have less officers           10:41:47  
19   watching more inmates, but I couldn't give you an exact           10:41:56  
20   number.           10:41:58

21           MR. PORTER: If I can respond to the objection           10:42:00  
22   now, Your Honor?           10:42:02

23           JUDGE NASTOFF: Sure.           10:42:02

24           MR. PORTER: As we laid out for the Court in           10:42:03  
25   opening statement, it is one of the mitigating factors           10:42:07

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1       that we have argued that it will be less costly for the       10:42:10  
2       State of Ohio to house Mr. Davis if he is given a       10:42:16  
3       sentence of less than death and for that purpose,       10:42:19  
4       correctional staffing levels are relevant.       10:42:23

5               MR. OSTER: Your Honor, we would object to the       10:42:27  
6       cost of housing inmates as being irrelevant as well.       10:42:29  
7       So, if that is a support for this line of questioning,       10:42:33  
8       we would stand by our first objection and support it       10:42:36  
9       with that a cost per inmate if ever being paroled would       10:42:38  
10       be irrelevant to what the Judges should consider in       10:42:43  
11       this case as well.       10:42:45

12              MR. PORTER: I don't think we are arguing staffing       10:42:46  
13       levels for parole. I think our argument is staffing       10:42:48  
14       levels because he is never going to get out.       10:42:52

15              JUDGE PATER: Does the State object or take       10:42:55  
16       exception to the reference made by Mr. Porter that it       10:43:00  
17       is a mitigating factor, the expense of supervising       10:43:04  
18       inmates?       10:43:08

19              MR. OSTER: I don't think the expense itself is a       10:43:09  
20       mitigating factor to this individual that can be       10:43:11  
21       considered by this Court, even under the (B)(7)       10:43:14  
22       catchall.       10:43:17

23              JUDGE PATER: Is there any case law, Mr. Porter,       10:43:17  
24       that would support that assertion that this has been       10:43:20  
25       determined by any court to be a mitigating factor?       10:43:23

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1	MR. PORTER: I know of none, Your Honor.	10:43:28
2	JUDGE PATER: Thank you.	10:43:30
3	(Judges confer off the record.)	10:43:32
4	JUDGE NASTOFF: All right. We are going to allow	10:44:03
5	it, but the issues that you raise will be considered in	10:44:05
6	the weight to be given.	10:44:09
7	MR. OSTER: Thank you, Your Honor.	10:44:12
8	MR. PORTER: I have no further questions. Thank	10:44:13
9	you very much, Your Honor.	10:44:15
10	JUDGE NASTOFF: All right. Mr. Oster?	10:44:15
11	CROSS-EXAMINATION	10:44:16
12	BY MR. OSTER:	10:44:18
13	Q. Good morning, Mr. Nowack. Did I say that	10:44:18
14	correctly?	10:44:33
15	A. Yes.	10:44:33
16	Q. My name is Michael Oster. I work for the State of	10:44:34
17	Ohio assistant prosecutor. I believe we spoke on the phone a	10:44:36
18	little while ago?	10:44:39
19	A. That's correct.	10:44:40
20	Q. Okay. Mr. Nowack, what is the population itself	10:44:40
21	at the Ohio State Penitentiary as a whole?	10:44:44
22	A. As a whole, it is roughly between 500 and 600	10:44:47
23	inmates, closer to 500.	10:44:57
24	Q. Okay. So the number 549 would be -- sound about	10:44:58
25	correct to you?	10:45:03

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1 A. That would sound correct, yes. 10:45:03

2 Q. And that is actually one of the smaller facilities 10:45:06  
3 run by the Department of Corrections throughout the State; is 10:45:09  
4 that correct? 10:45:11

5 A. That is correct. 10:45:11

6 Q. And the -- in your summary report that Mr. Porter 10:45:12  
7 discussed with you from April of this year, there was one 10:45:16  
8 incident that was marked in I believe January of 1990 and that 10:45:19  
9 incident was where Mr. Davis was ordered to do something and 10:45:26  
10 refused, correct? 10:45:29

11 A. That is what is in my report, correct. 10:45:30

12 Q. And the Ohio State Penitentiary I believe you said 10:45:33  
13 has two kind of separate -- there is a camp and then a 10:45:38  
14 separate institution, is that roughly correct? 10:45:41

15 A. That's correct. 10:45:44

16 Q. And Mr. Davis would be in the, what you said Level 10:45:44  
17 4, 5 and death row, correct? 10:45:48

18 A. To kind of clarify that, within our main building, 10:45:51  
19 we have what are called blocks, and we separate our inmates 10:45:54  
20 one block would be for Level 4 inmates, one block would be for 10:45:58  
21 Level 5 and two blocks would be for death row, so he would be 10:46:04  
22 within the block of death row inmates. 10:46:07

23 Q. Okay. So he's solely in a death row block 10:46:10  
24 currently, would that be correct then? 10:46:13

25 A. That's correct, yes. 10:46:15

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1	Q. And that death row block, as you have just	10:46:16
2	described it, there are no female inmates in that block,	10:46:19
3	correct?	10:46:23
4	A. No, there are not.	10:46:23
5	Q. And you said you have worked in total for the	10:46:24
6	department for, let's see if I get it straight, 13 total	10:46:27
7	years; is that correct?	10:46:30
8	A. Approximately, yes.	10:46:31
9	Q. And in your 13 years' experience, it would be	10:46:32
10	correct, wouldn't it, that death row inmates get fewer	10:46:35
11	write-ups than the general population inmates?	10:46:38
12	A. Through my experience, that would be correct.	10:46:41
13	JUDGE NASTOFF: Didn't hear the answer.	10:46:44
14	THE WITNESS: Yes, correct. Sorry.	10:46:47
15	MR. OSTER: That's all the questions I have, Your	10:46:52
16	Honor. Thank you.	10:46:53
17	MR. PORTER: We do have two or three questions	10:46:54
18	based upon his questions, Your Honor.	10:46:56
19	JUDGE NASTOFF: You may proceed.	10:46:57
20	REDIRECT EXAMINATION	10:46:57
21	BY MR. PORTER:	10:46:59
22	Q. Mr. Nowack, are you familiar with the term, honor	10:46:59
23	dorm or honor block?	10:47:11
24	A. Yes, I am.	10:47:13
25	Q. And could you please tell the Judges as that	10:47:14

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1 relates to death row? 10:47:17

2 A. Death row has what we refer to as an extended 10:47:20  
3 privilege unit. The extended privilege unit serves as an 10:47:25  
4 incentive for inmates to have good conduct. 10:47:30

5 Q. Do you know if Mr. Davis is located in the honor 10:47:34  
6 block? 10:47:40

7 A. Yes, he is. 10:47:40

8 Q. What -- how is it determined -- I assume not all 10:47:41  
9 of death row is in the honor block? 10:47:47

10 A. No, they are not. 10:47:50

11 Q. How is it determined who is placed in the honor 10:47:51  
12 block? 10:47:55

13 A. Inmates who go a minimum of 36 months without any 10:47:56  
14 major rule violations, will be placed on a waiting list for 10:48:02  
15 that block. 10:48:05

16 Q. How long, if you know, presently is the waiting 10:48:06  
17 list? 10:48:11

18 A. The majority of inmates who are in the honor block 10:48:12  
19 have not received any rule violations in well over six years. 10:48:18

20 Q. If an individual is placed in the honor block and 10:48:22  
21 they are found guilty, for lack of a better term, of 10:48:29  
22 misconduct, can they be removed from the honor block? 10:48:33

23 A. They will be removed, correct. 10:48:36

24 Q. And do you know how long Mr. Davis has been in the 10:48:37  
25 honor block? 10:48:39

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1	A. Since May of 2006.	10:48:40
2	MR. PORTER: I have no further questions. Thank	10:48:57
3	you.	10:48:58
4	JUDGE NASTOFF: Any recross?	10:48:58
5	MR. OSTER: If I could have just one minute.	10:49:00
6	JUDGE NASTOFF: You may.	10:49:02
7	MR. OSTER: No, Your Honor. Thank you.	10:49:10
8	JUDGE NASTOFF: All right. And again, may this	10:49:12
9	witness be permanently released from his subpoena?	10:49:13
10	MS. COOK-REICH: Yes, Your Honor.	10:49:16
11	JUDGE NASTOFF: All right. Mr. Nowack, your	10:49:17
12	testimony is complete and you are released from your	10:49:19
13	subpoena and you are free to return to your duties.	10:49:21
14	Thank you.	10:49:23
15	THE WITNESS: Thank you.	10:49:24
16	MS. COOK-REICH: We would call Dr. Robert Smith.	10:49:30
17	DR. ROBERT SMITH	10:49:34
18	having been first duly sworn, was examined and testified under	10:49:34
19	oath as follows:	10:49:52
20	MS. COOK-REICH: Your Honor, just so that you	10:49:52
21	know, there is a female going to take my place at the	10:49:53
22	table neither Randall nor I are technologically savvy,	10:49:55
23	someone else will be touching the computer.	10:50:00
24	JUDGE NASTOFF: All right. No objection to the	10:50:01
25	technological assistance.	10:50:06

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1 MR. OSTER: I guess the only thing I would just 10:50:10  
2 add, is she from one of the offices? I just wanted to 10:50:11  
3 know who was sitting next to me as well, Your Honor. 10:50:18  
4 Thank you. 10:50:21

5 MS. COOK-REICH: She is from the Ohio Public 10:50:21  
6 Defender's office. 10:50:24

7 DIRECT EXAMINATION 10:50:24

8 BY MS. COOK-REICH: 10:50:27

9 Q. Can you state your name for the record, please? 10:50:27

10 A. Dr. Robert Smith. 10:50:46

11 Q. Okay. And Dr. Smith, are you employed anywhere? 10:50:48

12 A. Yes, I am a clinical psychologist. I am also a 10:50:50  
13 certified addiction specialist. I am in private practice in 10:50:54  
14 West Lake, Ohio. Well, actually it's Rocky River, Ohio is 10:50:58  
15 where my office is located. And then I consult with a number 10:51:01  
16 of various agencies within the community. I work with Metro 10:51:05  
17 Health Medical Center with their employee assistance program. 10:51:08  
18 I teach at Case Western Reserve University with the department 10:51:11  
19 of psychology. I do lectures for the law school and medical 10:51:14  
20 school. I work with two treatment programs. One is a 10:51:18  
21 treatment program for homeless, chemically dependent, mentally 10:51:20  
22 ill women and their children. It's a unique treatment model 10:51:26  
23 that we have developed to treat the mother and the child, and 10:51:28  
24 then I also work with a program that has both a detoxification 10:51:31  
25 unit, outpatient services, and a men's program for homeless, 10:51:36

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1	chemically dependent, mentally ill men. And then I have a	10:51:41
2	small private practice and then I also do forensic psychology.	10:51:45
3	Q. And what is your business address?	10:51:49
4	A. 20525 Center Ridge Road, Rocky River, Ohio.	10:51:50
5	Q. You have stated that you are both a clinical	10:51:55
6	psychologist and certified addiction specialist. Can you	10:51:59
7	relate for me or -- well, let me first, there should be an	10:52:02
8	exhibit notebook in front of you.	10:52:06
9	A. Yes.	10:52:08
10	Q. L as in Lorena. Can you turn to that in your	10:52:08
11	notebook? Do you recognize the document contained there?	10:52:24
12	A. Yes, I do.	10:52:27
13	Q. And what is that?	10:52:27
14	A. That is my curriculum vitae.	10:52:28
15	Q. Okay. Can you tell this Court your educational	10:52:31
16	background?	10:52:35
17	A. I am trained as a clinical psychologist. I did my	10:52:35
18	Bachelor's degree, Master's degree, and Doctorate at Kent	10:52:39
19	State University. As part of that training you have to do an	10:52:44
20	internship. I did a full year of internship at Cleveland	10:52:46
21	Metropolitan General Hospital. The focus was on adolescents,	10:52:50
22	children and adults, both inpatient and outpatient. When I	10:52:54
23	finished that, I obtained my license as a psychologist, and	10:52:57
24	did what is called a post-doctoral psychology trainee	10:53:02
25	internship. Also did that at Cleveland Metropolitan General	10:53:06

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1 Hospital. That time I focused on the diagnosis and treatment 10:53:12  
2 of addictions so I became both a clinical psychologist and 10:53:14  
3 then became a certified addiction specialist. 10:53:18

4 Q. Did you go beyond Post-Doctoral? 10:53:20

5 A. Basically what I did is I ended up working at 10:53:26  
6 Metro Health Medical Center. They hired me once I completed 10:53:28  
7 my internship. Initially, I was just a staff psychologist and 10:53:31  
8 then I became director of their alcohol and drug treatment 10:53:35  
9 program and served as the director there for approximately ten 10:53:38  
10 years. 10:53:42

11 Q. When did you first hold that position? 10:53:42

12 A. Let me make sure I have the right date. 1984. 10:53:46

13 Q. Okay. And would it be fair to say that you have 10:53:56  
14 been working in that profession since that time? 10:53:59

15 A. That's correct. 10:54:01

16 Q. Are you licensed by the state of Ohio? 10:54:02

17 A. Yes, I am. 10:54:03

18 Q. In what field? 10:54:03

19 A. Clinical psychology. 10:54:05

20 Q. Is there a license for addiction specialists? 10:54:06

21 A. There is a certification. I have a national 10:54:09  
22 certification as an addiction specialist. 10:54:11

23 Q. And who does that certification? Is there that -- 10:54:13

24 A. Yes, I will give you the full title of it. The 10:54:18  
25 American Academy of Healthcare Providers and addictive 10:54:21

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1 disorders. 10:54:25

2 Q. And what did you have to do for that 10:54:25  
3 certification? 10:54:27

4 A. You have to demonstrate that you have had adequate 10:54:28  
5 training. You then have to have a certain number of hours of 10:54:31  
6 experience, or years of experience. You then have to take a 10:54:34  
7 written exam and oral exam and then have to maintain ongoing 10:54:38  
8 continuing education to renew your certification. 10:54:43

9 Q. And how -- when was the first year you had such 10:54:46  
10 certification? 10:54:49

11 A. Oh, golly, it would probably be around 1984, '85. 10:54:50

12 Q. Okay. And have you continued to have that 10:54:55  
13 certification recertified for each time up until this year? 10:54:58

14 A. That's correct. 10:55:02

15 Q. You have never lost your certification? 10:55:02

16 A. No, I have not. 10:55:05

17 Q. And when did you first become licensed as a 10:55:06  
18 clinical psychologist? 10:55:11

19 A. 1983. 10:55:11

20 Q. Other than what you have already related as your 10:55:13  
21 professional background, can you go forward from there in 10:55:18  
22 regards to where you have worked after Cleveland Medical 10:55:20  
23 Center? 10:55:22

24 A. Basically what I have done is my career has been 10:55:23  
25 focused on what's called co-occurring disorders. My interest 10:55:25

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1 has been on individuals who have more than one psychological 10:55:28  
2 condition. So I work with individuals who have both 10:55:34  
3 depression or anxiety, or personality disorder, and also maybe 10:55:36  
4 abusing alcohol and drugs, and may also have some type of 10:55:40  
5 medical condition like HIV or STDs, sexually transmitted 10:55:45  
6 diseases, individuals who are homeless. So that my career has 10:55:51  
7 been interested in individuals who have multiple problems and 10:55:55  
8 how, as a treatment community, can we address those needs and 10:55:59  
9 help people re-establish themselves. 10:56:03

10 And so I have had a number of research grants, one 10:56:05  
11 of them was through the substance abuse and mental health 10:56:08  
12 services administration. The acronym is SAMSA. Basically 10:56:10  
13 what we did was received a grant to treat homeless chemically 10:56:16  
14 dependent women and their children. It was one of the first 10:56:20  
15 times --

16 COURT REPORTER: I'm sorry?

17 JUDGE NASTOFF: You have to slow down for our  
18 court reporter.

19 A. Yes, I start talking about my research, I get  
20 excited. It was a treatment program specifically designed to 10:56:29  
21 treat women and their children. The women were homeless, 10:56:33  
22 chemically dependent and mentally ill, and this was the first 10:56:35  
23 time in the United States that we had ever done that. So 10:56:38  
24 there were 50 sites funded nationwide and we developed these 10:56:41  
25 treatment models and I worked with that project for about 10:56:45

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1 seven years. Once I completed that, I now work at an agency  
2 called Hitchcock Center which is based on that model.

3 Another research project which I had was for  
4 homeless, chemically dependent, mentally ill men who were  
5 offenders. So they were either on probation or parole, and  
6 this was sort of a community re-entry program or a diversion  
7 program depending upon their status. And we were developing  
8 what we call wrap around services. Full range of services  
9 both psychiatric, psychological chemical dependency, case  
10 management, vocational, did all of these services with these  
11 men, to see if we could prevent them from relapsing to alcohol  
12 and drugs, avoid them being re-incarcerated, and to assist  
13 them in re-establishing themselves in the community in a  
14 positive and healthy way.

15 Q. Other than the two grants that you have discussed,  
16 are there other grants that you are involved with?

17 A. Currently we have a grant that we have just  
18 written it is Stella Maris, the intent is to again be able to  
19 work with this male population. We have a housing unit at 40  
20 beds and we have men there, but we don't have the full wrap  
21 around services because we don't have funds. Unfortunately  
22 the State has had to cut a lot of the funding for various  
23 programs. So we have a grant that is pending. But we also  
24 have a program that is with the federal government, we have a  
25 federal pretrial and probation program with Stella Maris, so

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1 | what we do is we work with individuals who are on re-entry or 10:58:24  
2 | again diversion, and we work with them to deal with their 10:58:29  
3 | addiction, to deal with their mental health issues and to 10:58:32  
4 | re-integrate into the community, so those are the primary 10:58:36  
5 | projects right now. 10:58:38

6 | Q. Okay. Are there facilities or places that you 10:58:39  
7 | work at besides your own clinical persons that you see? 10:58:43

8 | A. I do the forensic psychology. 10:58:48

9 | Q. Okay. Do you teach? 10:58:52

10 | A. Yes, I do. 10:58:54

11 | Q. Where at? 10:58:55

12 | A. Case Western Reserve. The most recent course I 10:58:56  
13 | taught was in the spring. It was cognitive behavioral therapy 10:59:00  
14 | and I worked with graduate students and taught them how to use 10:59:04  
15 | specific psychological techniques in working with various 10:59:07  
16 | kinds of disorders. And right now I have an intern from 10:59:10  
17 | Case's graduate program who is going to be spending a year 10:59:15  
18 | with me at Stella Maris. 10:59:19

19 | Q. You keep saying Stella Maris, can you spell that? 10:59:20

20 | A. Sure. S-T-E-L-L-A, M-A-R-I-S. Like Star of the 10:59:23  
21 | Sea. 10:59:30

22 | Q. Okay. Are you currently scheduled to hold any 10:59:30  
23 | additional lectures or teaching positions? 10:59:36

24 | A. I do a lot of teaching both at the university but 10:59:40  
25 | also for the community. Also for, as I said, the legal system 10:59:44

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1 I often do continuing legal education. I did a recent thing 10:59:49  
2 in April in Phoenix, they were interested in recent research 10:59:52  
3 developments in alcohol and drug abuse, both the etiology, the 10:59:58  
4 causes and then also the treatment. So I presented for the 11:00:03  
5 court out there, it involved the magistrates, lawyers, anyone 11:00:05  
6 involved with the Court in Maricopa County was invited. So I 11:00:10  
7 presented there recently. Coming up I will be doing the 11:00:15  
8 continuing legal education for the Ohio Supreme Court 11:00:18  
9 magistrates. This will be my first time to do that for them. 11:00:20

10 Q. What will your topic be for the Ohio Supreme Court 11:00:24  
11 magistrates? 11:00:28

12 A. I'm going to do alcohol and drug abuse. 11:00:28

13 Q. You indicated that you had forensic psychology 11:00:30  
14 work, could you explain what that is? 11:00:33

15 A. Probably about fifteen years ago, I -- well, it 11:00:36  
16 goes all the way back to my dissertation. My dissertation is 11:00:39  
17 not guilty by reason of insanity, and so I was doing an 11:00:43  
18 examination of how psychologists approach that question and 11:00:46  
19 whether or not training and experience, how much of that you 11:00:49  
20 need in order to be able to make an accurate determination. 11:00:53  
21 So that was my first interest. I also did a rotation during 11:00:56  
22 one of my internships that was a forensic psychology rotation. 11:00:59  
23 Then I began doing work, probably about fifteen years ago, 11:01:04  
24 both for the court and for both legal, I should say capital 11:01:08  
25 cases, but then also non-capital cases. Doing evaluations of 11:01:12

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1	competency, NGRI, and then looking at cases in which there had	11:01:16
2	been a charge of murder.	11:01:20
3	Q. Do you also have a private practice?	11:01:22
4	A. Yes, I do.	11:01:24
5	Q. And what do you do in that private practice?	11:01:24
6	A. I have this private practice in Rocky River where	11:01:27
7	I see somewhere between ten and twelve clients a week	11:01:31
8	basically with a variety of different issues. Basically	11:01:36
9	adolescents and adults. I don't work with children in my	11:01:39
10	private practice. And they are individuals who present either	11:01:42
11	with depression, anxiety, post-traumatic stress disorder,	11:01:47
12	something of that nature and I work with them individually.	11:01:52
13	Q. Have you ever testified in court before?	11:01:54
14	A. Yes, I have.	11:01:56
15	Q. Can you relate to the Court where you have?	11:01:56
16	A. Probably around fifteen to twenty different states	11:01:59
17	now, Indiana, Illinois, Mississippi, Phoenix, South Carolina,	11:02:07
18	Florida, Connecticut, I don't know.	11:02:14
19	Q. Have you testified in both state and federal	11:02:19
20	courts?	11:02:20
21	A. Yes, I have.	11:02:21
22	Q. In regards to the State of Ohio, have you ever	11:02:22
23	testified and been qualified as an expert of addiction?	11:02:25
24	A. Yes, I have.	11:02:29
25	Q. Can you relate for the Court where that has been?	11:02:29

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1	A.	It's been Dayton, Cincinnati, Cleveland.	11:02:31
2	Q.	Cuyahoga County, Hamilton County, Montgomery	11:02:39
3		County?	11:02:44
4	A.	Yes, I believe so.	11:02:44
5	Q.	Have you ever testified in Butler County?	11:02:45
6	A.	Not that I recall.	11:02:46
7	Q.	The same question relative to clinical psychology,	11:02:47
8		have you testified and been qualified as an expert in any	11:02:50
9		State of Ohio court under that expertise?	11:02:53
10	A.	Yes.	11:02:57
11	Q.	And can you relate to the Court where?	11:02:57
12	A.	The same ones.	11:02:58
13	Q.	And can you give me a timeframe?	11:02:59
14	A.	It's been over the last fifteen years. I have	11:03:01
15		been doing forensic work.	11:03:05
16	Q.	And other than what I have already asked you	11:03:06
17		relative to certificates and education, have we left any of	11:03:12
18		your experience out?	11:03:19
19		COURT REPORTER: I'm sorry?	11:03:19
20	Q.	Certificates, training, education, have we left	11:03:19
21		any of your experience out?	11:03:21
22	A.	No, I think that was a good review.	11:03:21
23		MS. COOK-REICH: Okay. Your Honor, I would ask	11:03:23
24		then that the Court allow Dr. Smith to be qualified as	11:03:26
25		an expert in the area of clinical psychologist and	11:03:30

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1	addiction specialist.	11:03:33
2	JUDGE NASTOFF: All right. Does counsel for the	11:03:33
3	State wish to voir dire the witness on his	11:03:35
4	qualifications?	11:03:37
5	MR. EICHEL: No, Your Honor.	11:03:38
6	JUDGE NASTOFF: All right. He will be so	11:03:39
7	admitted.	11:03:40
8	MS. COOK-REICH: Thank you, Your Honor.	11:03:41
9	Q. (BY MS. COOK-REICH) Dr. Smith, you have been	11:03:42
10	retained in this case by court appointed funds to give an	11:03:44
11	opinion, do some reviews; is that correct?	11:03:48
12	A. That's correct.	11:03:50
13	Q. Okay. You have interviewed specifically Von Clark	11:03:50
14	Davis; is that correct?	11:03:55
15	A. That is correct.	11:03:55
16	Q. And do you see him seated in the courtroom?	11:03:56
17	A. Yes, I do.	11:03:58
18	Q. And is he seated over here to the right of me in	11:03:59
19	the olive colored shirt?	11:04:02
20	A. He is in the middle, yes.	11:04:04
21	Q. And is that the person that you, in fact,	11:04:04
22	evaluated?	11:04:06
23	A. Yes, it is.	11:04:07
24	Q. To perform this evaluation, what are the things --	11:04:07
25	some of the things you did in order to complete the	11:04:11

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1 evaluation?

11:04:14

2 A. My approach is pretty standard. I typically want  
3 to see the defendant at least two times, if possible. I like  
4 to do collateral interviews with family or friends who would  
5 be aware of the individual's functioning, their history,  
6 background. I like to do a review of records that are  
7 appropriate or relevant, and then when I meet with the  
8 defendant I do what is called a structured psychosocial  
9 history, reviewing their background, both in terms of  
10 development as a child, school, work, legal history,  
11 employment, military history, any treatment for alcohol and  
12 drug addiction, their use of alcohol and drugs, any mental  
13 health history, their family background, relationships, so  
14 that I have, hopefully, a very rounded picture of the  
15 individual's background, their development and any  
16 psychological disorders or addiction that they might have.

11:04:14

11:04:17

11:04:21

11:04:25

11:04:29

11:04:33

11:04:35

11:04:39

11:04:42

11:04:45

11:04:50

11:04:54

11:04:59

11:05:03

11:05:06

17 Q. Do you also commonly review their criminal  
18 history?

11:05:09

11:05:12

19 A. Yes.

11:05:12

20 Q. In this particular case, in the case of Von Clark  
21 Davis, did you do so, all of those things that you just said  
22 in regards to reviewing items, documents and interviews?

11:05:13

11:05:16

11:05:18

23 A. Yes, I did.

11:05:22

24 Q. You have prepared a PowerPoint presentation  
25 listing what those are?

11:05:22

11:05:25

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1 A. Yes, I have. 11:05:26

2 Q. And the female seated over here, is there a 11:05:27  
3 clicker for that? 11:05:30

4 SPEAKER: No. 11:05:33

5 Q. (MS. COOK-REICH) Specifically in regards to this 11:05:41  
6 case, in your evaluation of Mr. Davis, can you relate to the 11:05:42  
7 Court the specific interviews, documents, information that you 11:05:42  
8 have reviewed? 11:05:45

9 A. Yes. I have to think of how I want to do this 11:05:46  
10 here. Let me go to the first slide. Basically what I did is 11:05:50  
11 I met with Von on two separate occasions at the Ohio State 11:06:01  
12 Penitentiary; March 23, 2009, April 7, 2009. Each of those 11:06:06  
13 interviews were for five to six hours and during that time I 11:06:11  
14 was able to do the comprehensive psychosocial history that we 11:06:15  
15 described, a diagnostic workup and a mental status 11:06:20  
16 examination. 11:06:23

17 Q. Okay. And you do a comprehensive what? 11:06:23

18 A. Psychosocial history. 11:06:26

19 Q. Psychosocial history? 11:06:30

20 A. Yes. 11:06:30

21 Q. What, other than seeing and interviewing and 11:06:31  
22 evaluating Mr. Davis, did you interview or evaluate, interview 11:06:35  
23 other members of his family? 11:06:38

24 A. Yes, I did. 11:06:40

25 Q. And who did you see? 11:06:40

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1           A. I had the opportunity to, in May, meet with 11:06:42  
2 Alluster Tipton, which is his mother, Charles Tipton, his 11:06:45  
3 stepfather, Elliot Davis, his brother, Carol Davis -- I'm 11:06:50  
4 sorry, Carol Smith, his sister, Victor Davis, his brother, and 11:06:54  
5 Patrick Michael Rotundo, his life-long friend. 11:06:58

6           Q. Okay. And were there any -- well, let me step 11:07:02  
7 back to that interview. Did you do all of those persons on 11:07:06  
8 one particular day? 11:07:09

9           A. Yes, I had an opportunity to meet with each of 11:07:10  
10 them individually in a private setting so that I could find 11:07:12  
11 out about their relationship with Von, and also then ask 11:07:15  
12 specific questions about observations they had about his 11:07:20  
13 development, his personality, his relationships. 11:07:24

14           Q. Okay. Is part of what your evaluation is 11:07:27  
15 performed to do is get a forensic or social history of a 11:07:32  
16 family and a person? 11:07:36

17           A. Yes. 11:07:37

18           Q. And did you do so in this case? 11:07:37

19           A. Right. The key here is to get corroborating data. 11:07:38  
20 Certainly you talk to the defendant and you get firsthand 11:07:44  
21 information from him, but what you are also looking for is 11:07:47  
22 what other sources of data do you have that can confirm what 11:07:49  
23 he is saying, so that you can have some degree of confidence 11:07:53  
24 that what you are hearing and understanding is valid and true. 11:07:56

25           Q. Did you have an opportunity to review any other 11:07:59

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1 documents other than your interviews? 11:08:02

2 A. Yes. 11:08:04

3 Q. And what did you review? 11:08:05

4 A. There is a number of them. We started out we had 11:08:06  
5 the Ohio Supreme Court opinion, there was a social history 11:08:10  
6 that had been established that I had an opportunity to review 11:08:14  
7 and a timeline of Von's life with key events that had 11:08:17  
8 occurred, and then interview summaries of individuals who 11:08:21  
9 investigators who had met with the family and gathered 11:08:27  
10 information prior to my meeting with them. So they had talked 11:08:30  
11 with Alluster Tipton, Charles Tipton, Fannie Whiteside, 11:08:33  
12 Elizabeth Crawford, Elliot Davis, next slide. 11:08:38

13 There were interview summaries for Victor Davis, 11:08:42  
14 Von, Joanne Ferguson, Roger Fisher, Charles Flowers, Delbert 11:08:45  
15 Flowers, Delane Hudson, Delores Stokes, so those were, again, 11:08:51  
16 social data sources, other people who knew Von, who had been 11:08:57  
17 interviewed, and so I was able to compare what was in these 11:09:02  
18 interviews with my own interview with them okay, because I 11:09:06  
19 interviewed many of those people. Then there were also 11:09:08  
20 records that are relevant to Von's background, there were 11:09:16  
21 school records and military records. 11:09:16

22 Next. Police reports, from the shooting of 11:09:18  
23 Ernestine Davis, police reports from the murder of Ernestine 11:09:22  
24 Davis, and then evaluations by other experts. An evaluation 11:09:25  
25 by Dr. Schweikert, an evaluation by Dr. Stevens, an evaluation 11:09:29

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1 by Dr. McDevit, CDR, or I'm sorry, ODRC, psychological  
2 records, police reports from the murder of Suzette Butler and  
3 testimony from the trial regarding the murder of Suzette  
4 Butler.

5 Then if we go on, there are additional documents,  
6 an evaluation by Dr. Fisher, the sentencing opinion, an  
7 affidavit of Dr. Schmitgossling, and affidavit of Dr. Ort what  
8 I am looking for, is this range of sources which are from  
9 different periods of time by various persons so that I have  
10 not just a snapshot, but an overview of Von's functioning and  
11 his behavior over years and years from various sources.

12 So I am not relying upon just my impression of him  
13 at the time that I meet with him, but rather I have lots of  
14 persons' impressions of him so that I can see sort of again  
15 the big picture and not a snapshot.

16 Q. And in regards to the interview summaries that you  
17 reviewed, I think you indicated that these were summaries with  
18 dates on them prior to you becoming involved in this case; is  
19 that correct?

20 A. That's correct.

21 Q. Do you recall the round about dates that you saw  
22 on some of these summaries?

23 A. No, I do not.

24 Q. Of the persons that you did see, yourself, like  
25 his mother, his stepfather and some of his brothers and

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1 sister, do you recall whether those summaries were close in 11:10:53  
2 time to the time that you saw them individually? 11:10:57

3 A. Some of them may have been close, others were 11:10:59  
4 further away in time. 11:11:02

5 Q. Is there a reason why you did not interview, let's 11:11:03  
6 say Joanne Ferguson who you reviewed an interview summary of? 11:11:08

7 A. The key people who I wanted to talk with, so that 11:11:13  
8 I was efficient were the people who had the most contact with 11:11:15  
9 Von and would have the most information regarding his early 11:11:19  
10 childhood development and his life functioning over the years, 11:11:23  
11 so I was looking at people who knew him over time. 11:11:27

12 Q. And if the Flowers family and those persons who 11:11:30  
13 were deceased or not available you wouldn't have obviously 11:11:33  
14 interviewed them in 2009? 11:11:35

15 A. Absolutely. 11:11:37

16 Q. That would be accurate? Okay. Relative to the 11:11:38  
17 prior psychological evaluations that you reviewed, on your 11:11:42  
18 slide placed some dates, specific dates next to those reports. 11:11:47  
19 Those span a multiple number of years; is that correct? 11:11:50

20 A. Yeah, they start in 1971, and go up through '98. 11:11:54  
21 So we have got a significant period of time covered by various 11:12:02  
22 professionals who saw Von and expressed their professional 11:12:06  
23 opinion about his functioning. 11:12:10

24 Q. Relative to your review, did you also review a 11:12:12  
25 psychological report relative to his leaving the Navy? 11:12:14

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1	A. Yes, I did.	11:12:18
2	Q. And that would have pre-dated 1971; is that	11:12:19
3	correct?	11:12:22
4	A. That's correct.	11:12:22
5	Q. Do you recall when that was?	11:12:23
6	A. I don't recall the exact date. Wait, here it is,	11:12:25
7	1964.	11:12:40
8	Q. Okay. That would involve the whole snapshot that	11:12:41
9	you are looking at, you are looking at the whole picture?	11:12:45
10	A. That's right, so we have an evaluation that is	11:12:48
11	done in 1964 but then we have evaluations that are done in	11:12:51
12	'71, '78, '80, '84, 2002, so we have got, again, this	11:12:54
13	longitudinal source of data regarding Von rather than just one	11:13:01
14	person's opinion at one time in one contact.	11:13:07
15	Q. The social history and forensic history that you	11:13:11
16	took from many of the family members and summaries that you	11:13:15
17	had, does that help you make diagnosis in this case?	11:13:17
18	A. Definitely. Again, because what I am looking at	11:13:21
19	is not just my impression when I meet with Von, but does my	11:13:25
20	impression have support from prior interviews by persons in	11:13:31
21	the past. Particularly if I am looking at a chronic disorder,	11:13:35
22	a disorder that I believe is life-long, well then it should be	11:13:39
23	pervasive and it should be present at various points, not just	11:13:42
24	when I see Von. And that also helps me to establish whether	11:13:46
25	or not there is malingering, because if he is presenting a	11:13:50

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1 particular symptom just with me and then there is never any 11:13:53  
2 symptom any other time, well then that would make me 11:13:56  
3 suspicious that this is someone who is attempting to fake a 11:13:59  
4 problem to serve their purposes. 11:14:04

5 Q. Based upon the history that you took from the 11:14:11  
6 client, the social forensic history that you obtained from the 11:14:16  
7 family and friends, and your review of the psychological -- 11:14:21  
8 prior psychological reports, and your own evaluation, do you 11:14:26  
9 have, based on your training, experience, education, an 11:14:31  
10 opinion as to -- within a reasonable degree of psychological 11:14:35  
11 certainty, as to whether von Clark Davis at the time of the 11:14:39  
12 offense in 1983 suffered from a mental disease or defect? 11:14:41

13 A. Yes. 11:14:45

14 Q. And what is that opinion? 11:14:46

15 A. Next slide. Basically it is my opinion that at 11:14:47  
16 the time of the offense von was suffering from two 11:14:50  
17 psychological disorders. One would be alcohol dependence and 11:14:54  
18 the other would be borderline personality disorder. And that 11:14:57  
19 both of these disorders were present and that they interfered 11:15:01  
20 with his cognitive functioning, that they impaired or 11:15:05  
21 diminished his ability at the time of the offense. 11:15:09

22 Q. And can you give a definition of what either 11:15:12  
23 personality disorders are or borderline personality disorder? 11:15:18

24 A. Sure, if we go to the next slide. If we start, 11:15:22  
25 the whole idea of personality, personality is a pattern of 11:15:24

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1 thinking and behavior and it is pervasive. It affects the way 11:15:30  
2 that we feel, it affects our perceptions and it affects our 11:15:35  
3 decisions and our behaviors. And when we look at a person's 11:15:40  
4 personality we know they have that style of approaching life. 11:15:44  
5 And each of us has a unique personality that is ours. And it 11:15:49  
6 is based upon our background, our life experiences, what we 11:15:52  
7 learned growing up, and so, we incorporate these life 11:15:56  
8 experiences and then we develop a pattern, and each of us has 11:16:01  
9 some of our own patterns, beliefs that we have about life, our 11:16:04  
10 likes and dislikes. And the way that we approach problems and 11:16:08  
11 situations is basically our personality style. And for most 11:16:12  
12 of us, our personality style is successful. It works. It is 11:16:17  
13 our way of adapting to life. 11:16:22  
14 we go through our day, we are faced with problems, 11:16:24  
15 we deal with them, we work them through, and we are 11:16:27  
16 successful. That is a healthy normal personality. Go to the 11:16:30  
17 next slide. What we have established in our field of 11:16:36  
18 psychology and psychiatry is that there are individuals who 11:16:41  
19 have personality disorders. In other words, the personality 11:16:45  
20 style that they develop is self-defeating, it actually doesn't 11:16:49  
21 work. And even though they continually fail, they don't 11:16:52  
22 change their style. They have this way of thinking about 11:16:57  
23 themselves and about life that repeatedly causes them to act 11:17:03  
24 in ways that are self-defeating. 11:17:08  
25 So if you notice here what we have got is they 11:17:11

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1 have distorted perceptions, they interpret situations in the 11:17:13  
2 wrong way, their emotions are labile, meaning that they go up 11:17:17  
3 and down very rapidly, with minor provocation, they have 11:17:22  
4 impaired impulse control, they overreact to situations without 11:17:28  
5 thinking about the consequences, their options and weighing 11:17:33  
6 the pros and cons. They have ongoing and constant 11:17:37  
7 difficulties in their relationships because of their 11:17:43  
8 misperceptions. They're interpreting situations in the wrong 11:17:47  
9 way, their labile emotions and their impulsivity. People who 11:17:51  
10 are healthy find it very difficult to be around and interact 11:17:55  
11 with someone with a personality disorder. 11:17:59

12 Q. You have given the opinion that Von suffers from a 11:18:03  
13 borderline personality disorder. Is that just one of the many 11:18:09  
14 personality disorders? 11:18:12

15 A. That is correct. Currently, we have ten different 11:18:14  
16 personality disorders that an individual might have. The one 11:18:18  
17 that I believe is appropriate for Von is borderline 11:18:22  
18 personality disorder. If we go to the next slide, what I am 11:18:26  
19 going to be describing as we go through is the data that comes 11:18:30  
20 from prior evaluations and then my own evaluation about Von. 11:18:35  
21 And the things that I'm going to focus on are thoughts, 11:18:40  
22 emotions and behavior, again, because that is really what 11:18:43  
23 defines someone's personality style. And so, I am going to be 11:18:45  
24 looking at how does he think, his perceptions, his ability to 11:18:50  
25 control his emotions, his social relationships, and we are 11:18:56

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1 going to establish that this is of long standing. That this 11:19:01  
2 is not just something that occurred recently, but that in fact 11:19:03  
3 goes all the way back to when he was evaluated in the Navy. 11:19:08

4 Q. When he was evaluated in the Navy, what can you 11:19:14  
5 tell me about the report that you did review that was helpful 11:19:19  
6 for this diagnosis that you are giving today? 11:19:21

7 A. Go to the next slide. There was an evaluation by 11:19:25  
8 JJ Cavanaugh with the United States Navy, who was chief of 11:19:28  
9 neuropsychiatry. What had occurred is that Von was absent 11:19:33  
10 without permission for five days, visiting his father in 11:19:38  
11 Washington DC. This is significant because as we got more 11:19:41  
12 history about Von's father, what we discovered is his father 11:19:45  
13 had been absent for many years, his father was an alcoholic, 11:19:50  
14 his parents had divorced and Von had had no contact with his 11:19:53  
15 father since about age 12. 11:19:57

16 And so, this leaving the Navy and going to find 11:20:00  
17 his father, first of all it is a very impulsive thing, 11:20:04  
18 certainly not approved of by the Navy, and reflects his desire 11:20:08  
19 to have relationships with people, and we will come back to 11:20:13  
20 that a little bit. But the evaluation identifies him as 11:20:16  
21 depressed, hopeless, borderline intelligence, an emotionally 11:20:20  
22 unstable personality. Now, what is significant is this is 11:20:27  
23 1964. In 1964, we did not have research based criteria for 11:20:31  
24 borderline personality disorder. We had lots of sort of 11:20:38  
25 theories about personality, but no real research. 11:20:42

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1                   So what we've got is an individual who is saying, 11:20:47  
2                   I know something is wrong with this individual's personality, 11:20:47  
3                   I can see it, he is emotionally unstable. And he is not 11:20:50  
4                   suitable, this is so severe that he is not suitable to be in 11:20:55  
5                   the US Armed Forces. And so he is given a discharge. So what 11:20:59  
6                   we are seeing is in 1964, impulsive behavior, inappropriate 11:21:04  
7                   behavior, behavior related to a relationship that is 11:21:10  
8                   dysfunctional relationship and we have got a diagnosis already 11:21:13  
9                   of there is something wrong with this individual's 11:21:15  
10                  personality. 11:21:19  
11                  Q. And let me just ask a couple of questions before 11:21:19  
12                  we go on. You're not giving an opinion that Von in 1984, I'm 11:21:24  
13                  sorry, 1983, was mentally insane to meet not guilty by reason 11:21:28  
14                  of insanity standards? 11:21:34  
15                  A. No. 11:21:35  
16                  Q. Okay. That's not what are you saying at all? 11:21:35  
17                  A. No, I'm not saying that he's hallucinating or 11:21:37  
18                  delusional. I am not saying that he was totally unable to 11:21:40  
19                  appreciate that his behavior was wrong. I'm not saying that. 11:21:43  
20                  MS. COOK-REICH: Just a second, we are having a 11:21:48  
21                  technical difficulty. We may need a few moments, Your 11:21:53  
22                  Honor. 11:22:24  
23                  JUDGE PATER: Well, if it's all right, we are able 11:22:28  
24                  to see it on this monitor. 11:22:29  
25                  JUDGE NASTOFF: I think we may have blown out a 11:22:34

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1	bulb.	11:22:37
2	MR. OSTER: Your Honors, I guess the only thing we	11:22:46
3	would say is that means every party can see a slide	11:22:48
4	except for us.	11:22:51
5	SPEAKER: We have another laptop.	11:22:52
6	JUDGE NASTOFF: Do you have a photocopy or a hard	11:22:54
7	copy of the slides that we can make a copy of for the	11:22:57
8	State?	11:23:00
9	MS. COOK-REICH: I have one, I started marking on	11:23:00
10	it.	11:23:02
11	THE WITNESS: This one is not marked on.	11:23:04
12	MR. OSTER: We don't mind how it is given to us.	11:23:07
13	We would appreciate being able to see it.	11:23:10
14	JUDGE NASTOFF: Joe, why don't we go ahead and	11:23:14
15	make two copies of what the doctor has there. One for	11:23:15
16	Mr. Oster and one for Mr. Eichel.	11:23:19
17	MS. COOK-REICH: Thank you, Your Honors.	11:23:22
18	JUDGE NASTOFF: why don't we take -- can you	11:23:24
19	continue with the testimony or are we going to be	11:23:26
20	moving through several pages pretty quickly?	11:23:30
21	THE WITNESS: Unfortunately, I don't have mine	11:23:30
22	now.	11:23:33
23	JUDGE NASTOFF: why don't we take five minutes.	11:23:33
24	And when we have got everybody ready to go we will come	11:23:35
25	back out. we will be in recess and hopefully back in	11:23:39

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1	session shortly.	11:23:48
2	MR. OSTER: Thank you, Your Honor.	11:23:46
3	(Recess taken at this time.)	11:37:56
4	JUDGE NASTOFF: We're on record in State of Ohio	11:41:00
5	vs. Von Clark Davis, CR1983-12-0614. I will indicate	11:41:02
6	for the record that all parties and counsel present	11:41:05
7	prior to the recess are again present. The witness	11:41:08
8	remains on the stand. Sir, I will remind you that you	11:41:12
9	remain under oath from prior to our recess. Also	11:41:18
10	indicate that all three members of the panel are	11:41:19
11	present as well, and ready to hear the continuation of	11:41:21
12	the testimony.	11:41:24
13	MS. COOK-REICH: Thank you, Your Honor.	11:41:24
14	JUDGE NASTOFF: You may proceed.	11:41:25
15	Q. (BY MS. COOK-REICH) We were speaking of prior	11:41:27
16	psychological evaluations that you reviewed prior to that	11:41:29
17	short break there and we discussed the Navy evaluation. Were	11:41:32
18	there additional psychological evaluations that you reviewed	11:41:35
19	that had some bearing upon your current diagnosis?	11:41:39
20	A. Yes.	11:41:41
21	Q. And what were those?	11:41:41
22	A. The next slide is an evaluation by Dr. McDevit.	11:41:43
23	Again this is in March of 1971. And he again finds Von to be	11:41:46
24	immature and impulsive. It is interesting that there is this	11:41:51
25	ongoing note also throughout the evaluations of general fund	11:41:56

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1 of information is poor, poor arithmetic skills, what we know 11:42:02  
2 from the school records is that Von only went so far in 11:42:06  
3 school, basically the 9th grade and then dropped out at the 11:42:10  
4 age of 17. So he had difficulties in school and it is 11:42:13  
5 reflected in these evaluations. So again, we are seeing some 11:42:16  
6 consistency in the evaluations, we are seeing this problem 11:42:19  
7 with immature and impulsive. If we go onto the next slide. 11:42:22  
8 Dr. McKeen, a psychologist at the Ohio State Penitentiary also 11:42:30  
9 does an evaluation of Von. He finds him to be rigid, unstable 11:42:35  
10 and hostile, who is actually afraid of his impulses. 11:42:40  
11 Compulsive defenses break down under pressure and when 11:42:44  
12 pressured tends to act out aggressively and he again sees a 11:42:48  
13 personality disorder, diagnosed him with hysterical 11:42:52  
14 personality combined with dissocial features. Now, what is 11:42:56  
15 important here again is we are beginning to see this repeated 11:43:01  
16 statement about immaturity, impulsivity, personality problems. 11:43:03  
17 Borderlines and we will talk about this specifically in a 11:43:10  
18 little bit, have difficulty with their impulses and they are 11:43:12  
19 actually somewhat concerned about their own impulses. 11:43:17  
20 They can have angry outbursts with very little 11:43:20  
21 provocation and this sort of shows that they are aware of 11:43:23  
22 this. Borderlines don't have good defenses. They don't have 11:43:27  
23 coping strategies. We have coping strategies. When we are 11:43:31  
24 stressed and overwhelmed we do constructive things. We might 11:43:34  
25 play a sport or swim or exercise or talk to a family member or 11:43:38

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1 a good friend. Borderlines don't have those coping strategies 11:43:42  
2 and so they act out their emotions in very inappropriate ways. 11:43:46

3 Q. The diagnosis by Dr. McKeen in '71 of hysterical 11:43:52  
4 personality combined with dissocial features, is that a 11:43:58  
5 current diagnosis available as a personality disorder? 11:44:02

6 A. No. Again, what we are looking at is a time when 11:44:04  
7 psychologists and psychiatrists had theories about diagnoses, 11:44:08  
8 but did not have research based criteria for diagnoses. So 11:44:12  
9 again, what we have is a person who is aware that there is a 11:44:18  
10 personality problem, but he does not have the criteria for 11:44:20  
11 borderline personality disorder in 1971, those didn't exist. 11:44:25

12 Q. Do you know when those became a criteria? 11:44:29

13 A. Basically, what we have is about 1980, we had the 11:44:32  
14 first significant objective criteria for personality disorder. 11:44:36  
15 In 1987 those were revised because we now had research so we 11:44:43  
16 started out with some objective criteria, then we tested them. 11:44:48  
17 In '87, we had some, you know, real data, and then in 1994, we 11:44:52  
18 have the most current criteria that we use today. So the 11:44:57  
19 criteria I am using for borderline personality disorder are 11:45:01  
20 based upon the research and sort of consensus of the 11:45:06  
21 professional field in 1994. 11:45:08

22 Q. Is that contained in any of the DSM books? 11:45:11

23 A. That's what I am referring to. The Diagnostic 11:45:15  
24 Statistical Manual 4th Edition was published in 1994. 11:45:17

25 Q. Thank you. The Dr. Rains' evaluation from the 11:45:22

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1 London Correctional Institution in 1978, do you see in 11:45:26  
2 reviewing his records, things that jump out at you relative to 11:45:29  
3 Von and borderline personality disorder? 11:45:34

4 A. Yes, that is on the next slide. It is -- Dr. Ron 11:45:36  
5 is a supervisor of psychological services at London 11:45:40  
6 Correctional Institute. He identified that Von had active 11:45:44  
7 detached -- he was active detached individual with schizoid 11:45:48  
8 trends. Now, interesting about the word schizoid is that 11:45:55  
9 actually is a personality disorder today. We have schizoid 11:45:56  
10 personality disorder. And what it means is that an individual 11:46:01  
11 who has severe problems with relationships, and in fact, has 11:46:02  
12 only a few relationships but they are dysfunctional, needs 11:46:06  
13 other people, their contact and support, but is suspicious of 11:46:11  
14 their motives. 11:46:14

15 Again, classic borderline symptom. Borderlines 11:46:16  
16 need relationships. They want them desperately and in fact 11:46:20  
17 are very frightened of losing what relationships they have. 11:46:25  
18 The problem is, is they have this vacillation between I love, 11:46:29  
19 you are wonderful, you are great, to then if you do just some 11:46:34  
20 minor thing that I don't like, I now am angry at you, you have 11:46:38  
21 hurt me, I hate you, I don't ever want to be around you any 11:46:44  
22 more, and that may happen within a couple of hours, and then 11:46:47  
23 back to, I love you, you are wonderful, you are the best thing 11:46:52  
24 in my life. Borderlines have very, very dramatic mood swings. 11:46:55  
25 And in their relationships they vacillate between this 11:47:00

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1 idealizing you to then wanting to push you away and reject 11:47:03  
2 you. So this is really describing that. Needs other people, 11:47:07  
3 their contact and support, but is suspicious of their motives. 11:47:10

4 I'm fearful of being hurt, I'm fearful of you 11:47:14  
5 abandoning me, leaving me. Lacks ego strength, frightened of 11:47:15  
6 his impulses again, difficulty coping with his feelings. So 11:47:21  
7 we are seeing a lot of consistency here. And within the 11:47:25  
8 institution he does well, which we would expect with someone 11:47:28  
9 with a personality disorder. Think about it. I am saying 11:47:32  
10 that you have got this dysfunctional style. If you put me in 11:47:35  
11 a very structured environment, with clear-cut rules and people 11:47:38  
12 who enforce those rules every day, the same way, I will adapt 11:47:43  
13 and I will adjust. My problem with borderline personality 11:47:48  
14 disorder is if I am in the community where I have no clear 11:47:51  
15 structure and I am reacting to whatever is happening to me 11:47:54  
16 throughout the day. 11:47:58

17 Q. The schizoid trends, I probably just killed that 11:48:01  
18 word. Schizoid trends? 11:48:01

19 A. Schizoid, yes. 11:48:08

20 Q. You said that that is a current diagnosis in 11:48:08  
21 DSM-IV, how would you say that you don't make that diagnosis 11:48:10  
22 when you see this in 1978? 11:48:14

23 A. Well, again, they are saying trends, they are not 11:48:16  
24 making a diagnosis. They are saying that it is one 11:48:20  
25 characteristic of the individual, and I am considering that 11:48:23

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1 characteristic in my diagnosis. So what I am trying to do is 11:48:25  
2 to take all of the data across time and come up with a 11:48:30  
3 diagnosis that incorporates that and is consistent rather than 11:48:33  
4 taking just one symptom and making the diagnosis based on 11:48:37  
5 that. 11:48:41

6 Q. Okay. Are there other evaluations you have 11:48:42  
7 reviewed? 11:48:45

8 A. Yes. 11:48:45

9 Q. And what are they? 11:48:46

10 A. The next slide shows an evaluation by Dr. Jones, 11:48:47  
11 Psychological Services London Correctional Institution. This 11:48:52  
12 is in 1980. He now has decided that Von has compulsive 11:48:56  
13 personality disorder. Difficulty with perfectionism, fear of 11:49:03  
14 failure, expects too much of others, and is viewed as a 11:49:07  
15 minimal risk to others at this point during the evaluation in 11:49:12  
16 London Correctional Institute. So what we have is again is 11:49:16  
17 another person doing an independent evaluation who is saying, 11:49:20  
18 I think there is a personality disorder going on here. I see 11:49:23  
19 something about this individual's style, the way they think, 11:49:26  
20 the way they interact with others that is dysfunctional. 11:49:28

21 And they are seeing him as expecting too much of 11:49:31  
22 others, which is a classic symptom of borderlines. Again, I 11:49:32  
23 idealize you, so now I think that you can do anything and 11:49:37  
24 everything to meet my needs. You are going to be my quote, 11:49:41  
25 savior and the minute that you fall short, the minute that you 11:49:44

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1 show any dissatisfaction with me, or suggest that you might 11:49:47  
2 leave me, then I react in a very inappropriate way, very 11:49:51  
3 emotional, very upset, very angry. So again, another 11:49:55  
4 evaluation independent that shows that. 11:50:01

5 Q. Dr. Fisher's report evaluation in 1984, closer in 11:50:06  
6 time to this offense did not determine that he had a 11:50:11  
7 borderline personality disorder. Was borderline personality 11:50:14  
8 disorder available in 1984? 11:50:18

9 A. In '84 it was described, there was no research 11:50:19  
10 data to support it at that point. It was not until 1987 that 11:50:23  
11 the actual diagnosis was available with research criteria to 11:50:27  
12 support it. So it was not available in '84. 11:50:33

13 Q. Was there something from Dr. Fisher's report that 11:50:34  
14 you found to be applicable to Von in your diagnosis today? 11:50:37

15 A. Yes. 11:50:40

16 Q. What is that? 11:50:40

17 A. If we go to the next slide it shows the evaluation 11:50:41  
18 by Dr. Fisher, he noted and then thought it was significant 11:50:43  
19 that Von described himself as on fire inside. Again, the 11:50:48  
20 sense of the emotions are out of control, they are very 11:50:54  
21 labile, very intense. At this point he denies use of alcohol 11:50:57  
22 or drugs. Dr. Fisher concluded that Von was free of mental 11:51:02  
23 disease or defect that would have impaired his capacity to 11:51:08  
24 appreciate the criminality of any conduct, okay? So he's 11:51:13  
25 basically saying that he is not NGRI. That he could 11:51:15

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1 appreciate that his behavior was wrong. 11:51:20

2 But he did indicate during his testimony that 11:51:24  
3 there was evidence of an explosive psychiatric disorder. Now 11:51:26  
4 this becomes important again because when we think about 11:51:30  
5 borderlines one of their characteristics is this sort of 11:51:34  
6 unwarranted aggressive behavior that comes about with minor 11:51:38  
7 provocation. It is out of proportion. What the individual 11:51:43  
8 has experienced does not warrant the kind of aggression and 11:51:49  
9 anger that they display. And that is characteristic of 11:51:54  
10 borderline personality disorder. Now, he diagnoses it as 11:51:57  
11 explosive psychiatric disorder which is very similar but it is 11:52:01  
12 just one symptom. So again, if Von didn't have the other 11:52:06  
13 symptoms of impulsivity, immaturity, he had problems with 11:52:11  
14 relationships and all of the other stuff I may go along with 11:52:16  
15 that. But we have to incorporate all of the information that 11:52:15  
16 we have from all of the other evaluations and his history. 11:52:17

17 Q. After 1984 you have had occasion to review 11:52:21  
18 additional reports that have been prepared after 1994, which 11:52:24  
19 means after the DSM-IV came out, can you explain the first one 11:52:28  
20 that you reviewed in 2002? 11:52:32

21 A. Yes. Miles Oden did an evaluation at the 11:52:34  
22 Mansfield Correctional Institute. He identifies that Von had 11:52:38  
23 a problem with alcohol in the past. He also identifies 11:52:42  
24 depressive symptoms that have been chronic and he gives a 11:52:45  
25 diagnosis of mood disorder and mixed personality disorder with 11:52:49

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1 anti-social traits. So again, what we have got is another 11:52:55  
2 person saying there is a personality disorder, identifying the 11:52:59  
3 alcohol abuse, identifying the depression. Well, borderlines 11:53:02  
4 have bouts with depression, they have bouts of anger and 11:53:06  
5 aggression, they have definitely times where they act out in 11:53:12  
6 anti-social ways, anti-social behavior okay. So again, this 11:53:16  
7 is not inconsistent with borderline. It is just based upon 11:53:20  
8 his snapshot. I don't know to what extent he was able to 11:53:25  
9 consider all of the other evaluations, how much time he spent 11:53:29  
10 with Von, or if he had any opportunity to do collateral 11:53:32  
11 interviews. So, again, this is, I think, an accurate 11:53:35  
12 depiction of symptoms that Von had at that time, but I don't 11:53:40  
13 think that the diagnosis is as descriptive as borderline is 11:53:43  
14 and as accurate. 11:53:47

15 Q. Did you review any other psychological evaluations 11:53:48  
16 after that? 11:53:52

17 A. No, I did not. 11:53:52

18 Q. You have talked about it in depth as you read 11:53:53  
19 through the particular evaluations you have reviewed. 11:54:00  
20 Borderline personality traits, there are certain things that 11:54:03  
21 you have seen in Von clearly. Can you go through what the 11:54:06  
22 traits are, what the symptoms are that you believe Von has, as 11:54:10  
23 well as the ones that you have not seen either yourself or in 11:54:14  
24 your evaluations? 11:54:17

25 A. Yes. If we go to the next slide what it does is 11:54:18

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1 | it give us an overview of what borderline is. The way to 11:54:21  
2 | understand borderline personality disorder is picture someone 11:54:26  
3 | who truly in many ways does not develop a sense of self. They 11:54:31  
4 | don't really have an identity. And so what they do is they go 11:54:36  
5 | through life reacting rather than thinking and acting. And 11:54:40  
6 | again, we have beliefs that influence our actions. We have 11:54:46  
7 | likes and dislikes, we have values, based upon our growing up 11:54:52  
8 | and what we have learned, those sort of guide us as we make 11:54:56  
9 | determinations. Borderlines have an unstable self-image, they 11:55:00  
10 | really don't know who they are. Oftentimes they are unclear 11:55:06  
11 | about sexual identity, they are unclear about any future of 11:55:08  
12 | what they want to accomplish, what they want to do with their 11:55:11  
13 | lives. Their emotions again labile. Up and down, sad, angry, 11:55:14  
14 | frightened, reacting to what is in front of them at the 11:55:19  
15 | present, really not any sustained emotion. 11:55:25  
16 |         Impulsivity that is severe, they act and then 11:55:27  
17 | think about it afterwards. They are not really considering 11:55:32  
18 | their actions and what the consequences will be, what the 11:55:35  
19 | other options are, the pros and cons, they act out again based 11:55:39  
20 | on what they are feeling. Relationships are disasters, just 11:55:43  
21 | train wrecks. They rarely have long standing healthy 11:55:48  
22 | relationships where there is intimacy and love and caring. 11:55:53  
23 | And again, this all begins late adolescents, early adulthood 11:55:56  
24 | and then continues on. It is a chronic disorder. 11:56:02  
25 |         Q. There are symptoms of borderline personality? 11:56:06

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1           A. Specific objective criteria that are used based on 11:56:09  
2 the research, the first one is frantic efforts to avoid real 11:56:12  
3 or imagined abandonment. Borderlines, again, feel great need 11:56:17  
4 to be involved in a relationship. They are afraid of being 11:56:21  
5 alone and when they feel that they are going to be left alone, 11:56:24  
6 they act out. Even the clients that I work with who have 11:56:28  
7 borderline personality disorder if I tell them I am going to 11:56:32  
8 be going on vacation, that will be a major issue in our 11:56:35  
9 treatment. Because now they are afraid that I am going leave 11:56:40  
10 them, that I am not going to come back, that I don't care 11:56:44  
11 about them, that I don't think that their problems are 11:56:46  
12 important, and it becomes a significant part of our therapy 11:56:49  
13 oftentimes for weeks prior to my vacation. So these 11:56:53  
14 individuals have a real hard time when they think someone is 11:56:56  
15 going to leave them or abandon them. 11:57:00

16           Pattern of unstable intense relationships. Again, 11:57:02  
17 going from idealizing the person to then devaluing the person 11:57:05  
18 and being angry at the person. And we see both of these in 11:57:11  
19 von. We see him not wanting to be alone and not wanting to be 11:57:14  
20 abandoned. In particular we see this with Ernestine and with 11:57:18  
21 Suzette, and we see these very unstable, unhealthy 11:57:21  
22 relationships. He's had lots of sexual relationships, almost 11:57:26  
23 always with women who abuse alcohol and drugs, almost always 11:57:29  
24 with women who have multiple sexual partners, women who are 11:57:33  
25 unlikely to form a commitment to him and be faithful in a 11:57:39

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1 relationship with him, but yet he thinks somehow that is going 11:57:42  
2 happen. 11:57:46

3 Identity disturbance again, Von has some sexual 11:57:48  
4 identity issues. He is not sure if he is heterosexual, 11:57:52  
5 homosexual, bisexual, he struggles with that. His sense of 11:57:56  
6 purpose and future, what are his goals. If we take a look at 11:58:01  
7 his work history, just his life pattern, there is no sense of 11:58:05  
8 direction, or planning for the future. And that was reflected 11:58:09  
9 by the collateral interviews as well. Impulsivity, we have 11:58:13  
10 ongoing impulsivity. The one most characteristic one is the 11:58:17  
11 substance abuse. But also we see it in his decisions to quit 11:58:23  
12 his jobs, to go from one place to another, there is no sense 11:58:25  
13 again of thinking through what is going to happen including 11:58:28  
14 the offenses. 11:58:32

15 There can be recurrent suicidal behavior, gestures 11:58:36  
16 or threats, I did not find any of that evident for Von either 11:58:41  
17 in his history or in my evaluation of him. Affective 11:58:45  
18 instability again, episodic dysphoria. Dysphoria is 11:58:48  
19 depression, and what we have got as evidence, both 11:58:51  
20 historically and from Von's interactions with me that he has 11:58:54  
21 had bouts of depression that have been significant, but again, 11:58:57  
22 they don't last. We don't see them showing up every time he's 11:59:01  
23 evaluated, we see them at various points along the way. 11:59:03

24 Chronic feelings of emptiness, in talking with Von 11:59:07  
25 and talking with others, there was this sense that he did not 11:59:10

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1 have a sense of who he was and where he was going. And what 11:59:13  
2 his life was going to be. Inappropriate and intense anger, we 11:59:16  
3 certainly have that present for Von. Where at times he has 11:59:21  
4 overreacted to situations with minimal provocation, the two 11:59:25  
5 most significant situations involved Ernestine and Suzette. 11:59:30

6 Transient stress related paranoid ideation, that's 11:59:34  
7 a mouthful. Basically what we are saying there, is this 11:59:44  
8 temporary, not long lasting, but intense suspicion of others. 11:59:46  
9 Paranoia, fear that the person is either acting to hurt me or 11:59:52  
10 doing something that will hurt me, planning to leave me, so 11:59:55  
11 that I now am suspicious of this other person that they are 12:00:01  
12 doing something, planning to hurt me. And again, if it was 12:00:05  
13 ongoing that would not be this. This is transient. And 12:00:09  
14 again, if we take a look at Von's history we see that there 12:00:12  
15 are bouts of this where he becomes suspicious of others. 12:00:18

16 Q. So of the nine factors or symptoms I guess he has 12:00:21  
17 eight of them? 12:00:26

18 A. Yes. 12:00:28

19 Q. And there are causes, I am assuming, of borderline 12:00:29  
20 personality disorder. They don't just pop up in people? 12:00:34

21 A. Yes. 12:00:37

22 Q. What are they? 12:00:38

23 A. At this point what we believe is there probably is 12:00:39  
24 some biological component that plays a role but we don't know 12:00:41  
25 what it is. We just don't have enough understanding of the 12:00:45

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1 brain's functioning, but what we do know is if we look at the 12:00:48  
2 research, people who have borderline personality disorder they 12:00:51  
3 are correlated with really very extreme backgrounds. 12:00:56  
4 Background in which there was no adequate parenting and 12:01:00  
5 supervision and nurturing growing up, so that these 12:01:03  
6 individuals, because of their predisposition of their 12:01:07  
7 biological makeup and because of their environment, don't 12:01:11  
8 develop a sense of themselves, and end up developing this 12:01:14  
9 personality disorder. 12:01:18

10 Q. Are there impacts of, doing that social history, 12:01:19  
11 forensic history, are there life events of Von's that have 12:01:31  
12 impacted his makeup and his ability to, strike that word 12:01:34  
13 ability, your diagnosis of borderline personality disorder? 12:01:38

14 A. Yes. If we think about this, everyone is not 12:01:44  
15 affected the same. We can grow up in the same household and 12:01:47  
16 still end up with very different personalities and styles. 12:01:50  
17 And that is based upon our unique experience. First of all, 12:01:53  
18 what birth order am I, life is different for me than it may be 12:01:59  
19 for my brother who was born five years later. My parents' 12:02:03  
20 relationship may be different. Who is in the home may effect 12:02:06  
21 it. My individual characteristics affect what impacts me. 12:02:09  
22 When we take a look at Von, many of Von's issues begin early 12:02:15  
23 in life. At a point where he is too young and too immature to 12:02:20  
24 be able to do anything about it himself. 12:02:26

25 And so as I talk about Von's family, and the 12:02:28

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1 characteristics of his home, most of this is occurring before 12:02:31  
2 the age of 12 or 14. At a time when he doesn't have any 12:02:34  
3 control over his life to make choices, to fix it or make it 12:02:38  
4 better. We need to keep in mind he is the second oldest of 12:02:41  
5 nine -- well, there is ten children one has died okay. So 12:02:48  
6 that becomes important as we take a look at that. 12:02:51

7 Q. And at age 12 or 13 there are those nine living 12:02:54  
8 children; is that correct? 12:02:58

9 A. Well, I think there is eight at that point, yes. 12:02:59

10 Q. Okay. What can you tell me about the impact of 12:03:01  
11 his life events in regards to this? 12:03:03

12 A. If we take a look at the next one, it says impact 12:03:05  
13 of life events, predisposition and early personality style. 12:03:08  
14 We know that, again, from family members and from Von, that 12:03:12  
15 early along, he had immaturity and impulsivity. He didn't 12:03:17  
16 have good coping strategies and he didn't have a lot of close 12:03:22  
17 relationships, so this is when he is a child growing up. So 12:03:26  
18 we have already got now this predisposition, this style that 12:03:29  
19 he has developed. 12:03:33

20 The mother and father are dysfunctional and that 12:03:34  
21 becomes an important theme because the most significant 12:03:37  
22 persons in our life as young children of course are our 12:03:41  
23 parents. We rely upon them for so many things to teach us, to 12:03:44  
24 mentor us, to set boundaries, to teach us values, right, 12:03:48  
25 wrong, to guide us. With von, as we will take a look as we go 12:03:52

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1 along, both his mother and his father had significant problems 12:03:56  
2 that prevented them from being able to be there for him. 12:04:01

3 Q. And when you speak of his father in these terms 12:04:04  
4 you are speaking of Nicholas Davis not Charles Tipton? 12:04:07

5 A. That's correct. 12:04:10

6 Q. Because you are speaking before the age of 12 or 12:04:11  
7 13 before his mother married Charles; is that correct? 12:04:13

8 A. That's correct. 12:04:16

9 Q. Okay. You have given a history of the birth order 12:04:17  
10 of the children and have produced a slide for that? 12:04:21

11 A. Yes. If you take a look at the slide that says 12:04:26  
12 Von's siblings, and it lists Elliot and Carol and Charles and 12:04:30  
13 Victor and Joanne and Michael and Lavonne and Carlos. So we 12:04:34  
14 have got a significant number of siblings and what I have done 12:04:37  
15 is I've indicated when they were born, who their fathers were 12:04:42  
16 and the age of Von as he continues to have more and more 12:04:46  
17 siblings within the home. 12:04:51

18 Q. Why is that important? 12:04:53

19 A. If we want to think about being cared for, 12:04:54  
20 nurtured and supported, the more children, obviously the more 12:05:01  
21 the parent has to share their time and energy with the other 12:05:04  
22 siblings. In a healthy home, that is difficult for a mother 12:05:09  
23 and father. But if we have a dysfunctional home, where the 12:05:13  
24 father is alcoholic, where he is abusive to the mother, where 12:05:17  
25 they separate repeatedly, where the father is involved with 12:05:21

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1 other women, the mother is involved with other women -- I 12:05:25  
2 mean, other men, and we have this ongoing repeated pregnancy 12:05:27  
3 for the mom, there is just not any time and energy to be given 12:05:33  
4 to Von by a parental figure. 12:05:40

5 Q. Dr. Smith, there are many families, my grandmother 12:05:43  
6 included, that came from large families, families of 13. Can 12:05:47  
7 you explain the distinction here when you are just talking 12:05:50  
8 about a family of ten? 12:05:54

9 A. Again, we are not talking about a specific number, 12:05:56  
10 what we are talking about, is what is the likelihood that Von 12:05:57  
11 can get his needs met. What we have already established is he 12:06:01  
12 has this predisposition to be immature, to not have good 12:06:03  
13 coping strategies, he doesn't have a lot of connections and 12:06:07  
14 now we put him in this family environment where mom and dad 12:06:10  
15 are dysfunctional and there are many other siblings competing 12:06:14  
16 with him to get their needs met. And I think as we go along 12:06:17  
17 and we describe the dysfunction of the parents we will see why 12:06:20  
18 for Von it is just not possible for him to get his needs met. 12:06:23

19 Q. Can you move onto the issue of the parents' 12:06:27  
20 issues? 12:06:30

21 A. Sure. We take a look at the next slide it says, 12:06:30  
22 parents' issues. First thing is Alluster, the mother, is only 12:06:33  
23 17 years old when she's pregnant with her first child, and 12:06:38  
24 Nick who is Von's father is only 16. And right from the 12:06:40  
25 start, they have got problems. They are arguing, they are 12:06:46

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1 fighting, Nick doesn't even know that Alluster is pregnant 12:06:50  
2 with the first child. He is going off to the Navy and ends up 12:06:54  
3 having to come back after he discovers that she is pregnant, 12:06:57  
4 that is in the next slide where it says Von's father. 12:07:01

5 They get married not because they have this 12:07:06  
6 loving, caring relationship, but because Nick thinks it is the 12:07:08  
7 thing you are supposed to do. Alluster is pregnant, he should 12:07:13  
8 marry her. But he is a chronic abuser of alcohol, he is 12:07:16  
9 verbally abusive to both Alluster and the children, he 12:07:20  
10 disappears for significant periods of time, providing no 12:07:24  
11 financial support to the family, and he is involved with 12:07:28  
12 numerous other women. So what we have got now is a dad who 12:07:31  
13 basically is absent. Absent either because he is intoxicated 12:07:36  
14 or because he is away from the home or because he is involved 12:07:40  
15 with other women. So we don't have a father figure who is 12:07:44  
16 consistent, who is supporting the family, and who is assisting 12:07:48  
17 with parenting. 12:07:51

18 Q. Okay. The problems of Von's mother? 12:07:53

19 A. If we go to the next slide it talks about Von's 12:07:57  
20 mother. Alluster is immature in her own way. She keeps 12:08:01  
21 taking Nick back, even though she knows he is abusing alcohol, 12:08:07  
22 he's mistreating her and he's involved with other women. Some 12:08:10  
23 of that I think is because she is not faithful. She is 12:08:15  
24 involved with other men, that becomes clear as we go along 12:08:18  
25 because she ends up having children with other men. She is 12:08:22

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1 often away from the home. She is leaving the child-care to 12:08:27  
2 her mother and her aunt who they already have ten or twelve 12:08:30  
3 people in their home, all extended family living together. 12:08:37

4 So now we have Alluster who is disappearing for 12:08:43  
5 periods of time, she is running around with other men and we 12:08:46  
6 have the children being left with relatives. 12:08:48

7 Q. If you have those extended family relatives why is 12:08:51  
8 it not possible that one of those persons stepped in and 12:08:55  
9 became Nick, the father? 12:08:58

10 A. That could work if there was a father figure, 12:09:01  
11 there was not a father figure. They could serve as a maternal 12:09:04  
12 figure, the problem is things aren't consistent. What we have 12:09:08  
13 is Alluster comes, she is there for a little bit, then she 12:09:11  
14 goes. We have Nick who is there, and then he goes. And so 12:09:14  
15 there is no consistency for Von as he is growing up. And for 12:09:18  
16 children, the only way that we learn anything is consistency. 12:09:23  
17 Two plus two is four only because every time you have ever 12:09:27  
18 heard it, two plus two is four. If half of the time you heard 12:09:30  
19 two plus two was seven, or twelve, or five, you would have no 12:09:35  
20 clue what two plus two is. 12:09:40

21 For a child, when the parental role is being 12:09:43  
22 passed back and forth between different people and there is no 12:09:48  
23 consistency, children have a very hard time sort of learning 12:09:51  
24 so then what is true, what is real? What is right, what is 12:09:54  
25 wrong? I think it is significant. Alluster was pregnant six 12:09:57

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1 years while Von was growing up. So she was carrying a child 12:10:07  
2 six years out of his early childhood years. She had eight 12:10:12  
3 newborns that she had to take care of while Von was growing 12:10:15  
4 up. So again, we have to put this all in context. She is 12:10:19  
5 coming and going. She is involved with different men. Von is 12:10:25  
6 passed among relatives and she is pregnant most of the time, 12:10:28  
7 and she has a newborn with her most of the time. So it is not 12:10:34  
8 just that she is pregnant, she has got a newborn and she has 12:10:38  
9 her other children. 12:10:41

10 Again, it is just not for her something that she 12:10:42  
11 could manage and she acknowledged that. And again, I am not 12:10:45  
12 making a judgment about her that she doesn't know about. As 12:10:49  
13 we talked she shared that this was what it was like as she was 12:10:52  
14 growing up. She was too young, as she said, to get married, 12:10:56  
15 she was too young to have children, but once the pattern 12:10:59  
16 started she didn't know how to stop it, and now being a mature 12:11:03  
17 woman, it is easy to look back and say gee, why did I do that? 12:11:07  
18 But she was caught in that cycle at that time. 12:11:10

19 Q. And she had multiple relationships and some of the 12:11:14  
20 children that she has have other fathers. Those were 12:11:17  
21 relationships that she had with other men during her marriage 12:11:20  
22 with Nick; is that correct? 12:11:23

23 A. That is correct. 12:11:24

24 Q. And specifically, obviously Nick Davis fathered 12:11:25  
25 four of the children? 12:11:28

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1           A.    Yes, if we go to the next slide, I have listed           12:11:28  
2   each of the relationships. She is with Nick Davis off and on           12:11:31  
3   for ten years and has four children, but has other children           12:11:35  
4   sprinkled in between. She has a child with Ralph Bud Green,           12:11:40  
5   she is with him for a year. So while she is married to Nick,           12:11:43  
6   she is involved with him for a year. Then there is AW Woods,           12:11:48  
7   she is with him for about a year and has a child, then James           12:11:52  
8   Curly, she is with him off and on for about three years and           12:11:57  
9   has a child, and then finally she is with Charles Tipton and           12:12:00  
10  she has three children with him.           12:12:06

11           Q.    And if Mr. Tipton testified earlier that they           12:12:07  
12  married in 1962, this would be after they have had a couple of           12:12:10  
13  children; is that correct?           12:12:14

14           A.    That's correct, if you notice I have 1960 to the           12:12:15  
15  present they had their first child before they were married           12:12:19  
16  and it is also important that, you know, Alluster acknowledged           12:12:22  
17  that these were not the only men she had relationships with,           12:12:25  
18  these were the only men she had children with. She had many           12:12:29  
19  other sexual partners in-between.           12:12:32

20           Q.    Was there anything else about his parents that you           12:12:38  
21  thought was important to the diagnosis of borderline           12:12:41  
22  personality disorder?           12:12:44

23           A.    I think it's just important to summarize that they           12:12:45  
24  both had extramarital relationships, they were both volatile           12:12:46  
25  and angry with one another and had lots of fights and           12:12:50

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1 arguments. They had numerous separations, the father abused  
2 alcohol every day, the mother abused alcohol occasionally, and  
3 they just were not there for the children.

4 Q. Charles Tipton, he came into the family before  
5 1962 about 1960. Did he have impact upon this borderline  
6 personality disorder diagnosis that you made?

7 A. Unfortunately I think Charles was the one hope  
8 that Von had, but it came too late. So much of our  
9 personality is formed early in life. And so unfortunately he  
10 comes when really Von is 12 years old and there is infrequent  
11 contact, they finally get married when Von is 14 and by that  
12 point Von's use of alcohol, his investment in school, his  
13 other problems, he is not around home a lot. He is now away  
14 from home. He is running the streets, he is with his peers,  
15 and there is not the type of relationship that he needed to  
16 really sort of turn this around.

17 So although I think Charles would have been well  
18 intentioned, he couldn't have that impact. Also Charles has  
19 his other obligations, he has another family, he is divorced,  
20 he has two other children from that relationship. He is  
21 working oftentimes two jobs and so there is not a lot of time  
22 to invest in Von at this point.

23 Q. Okay. Is there any other impact on Von that you  
24 found from the family, the parents I'm going to start with?

25 A. Yeah, if we take all of this environment and then

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1 couple that with Von's sort of predisposition, his individual 12:14:35  
2 makeup, and we think about so then what does that do to him? 12:14:41  
3 How does that impact him? Well, what we find is that there is 12:14:45  
4 this lack of nurturing from the parents. So what happens is 12:14:48  
5 Von doesn't have a bond with his mother and father. What is 12:14:51  
6 interesting is I mentioned earlier that the one point Von left 12:14:56  
7 the Navy to go connect with his father, that is Von's attempt 12:14:59  
8 to try to find his dad. There is not really a bond, there is 12:15:03  
9 no relationship, there is no connection. He is still looking 12:15:06  
10 for that even when he is, you know, in the Navy. There is 12:15:10  
11 ongoing neglect, there is abandonment. The father literally 12:15:16  
12 disappears after their divorce. There is no contact with Von. 12:15:19  
13 He has no consistent father figure from birth to 12:15:22  
14 14. There is not a male figure within the family to serve as 12:15:25  
15 a role model. The mother is promiscuous and preoccupied with 12:15:29  
16 men, I think that becomes important for Von because he picks 12:15:34  
17 up on that. His own promiscuity, his own involvement with 12:15:37  
18 many women, he has confusion of sex with love. He does not 12:15:42  
19 develop a healthy identity or sense of himself. 12:15:47  
20 If we go to the next slide I talk about Von 12:15:51  
21 doesn't experience love, nurturing or intimacy. There is just 12:15:54  
22 not that relationship in his life to provide that. His family 12:15:58  
23 members acknowledge that he is really not close to anyone. 12:16:04  
24 They talked about him not confiding in them, not sharing with 12:16:07  
25 them that he is really not emotionally close to any of them. 12:16:12

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1 He engages in dysfunctional sexual relationships. As I talked 12:16:15  
2 about he has some sexual role confusion in terms of whether he 12:16:21  
3 is heterosexual or homosexual. He confuses sex with 12:16:24  
4 infatuation and love. 12:16:31

5 He's suspicious and untrusting of others, always 12:16:33  
6 concerned that people are going to hurt him, leave him or 12:16:36  
7 abandon him. If we look at the next slide he becomes sexually 12:16:39  
8 promiscuous. He is involved with multiple sexual partners 12:16:44  
9 even when he is in a relationship. So while he is with 12:16:48  
10 Ernestine, and while he's with Suzette he is involved with 12:16:52  
11 other women. And again, the personality disorder really comes 12:16:56  
12 through because he doesn't see anything wrong with that for 12:16:59  
13 him, but he becomes upset with Ernestine and Suzette that they 12:17:01  
14 are involved with other men. 12:17:06

15 He uses alcohol beginning in adolescence and 12:17:10  
16 begins to use it more and more, and it becomes one of his ways 12:17:14  
17 of dealing with emotional discomfort. Alcohol is a central 12:17:18  
18 nervous system depressant, it's a wonderful way to 12:17:24  
19 self-medicate. I don't like how I feel. I drink. I get an 12:17:25  
20 artificial feeling of being relaxed, of not being upset or 12:17:28  
21 worried about my problems. He has no clear plans for his life 12:17:33  
22 or his future. He never really picks any type of career path. 12:17:36  
23 Doesn't really show any consistent likes or dislikes for 12:17:41  
24 anything. Seems to really be sort of vacillating, wandering 12:17:45  
25 through life. 12:17:50

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1            Reacts to his environment and to those around him, 12:17:51  
2            doesn't consider the consequences of his actions, and 12:17:54  
3            basically, my opinion is that he develops borderline 12:17:57  
4            personality disorder, which is present by late adolescence and 12:18:02  
5            then present throughout his adult life and is present today. 12:18:06

6            Q.    Is there ongoing trauma because of the borderline 12:18:11  
7            personality disorder? 12:18:16

8            A.    The borderlines they go through life as young 12:18:17  
9            children, not having any intimacy, not having any close 12:18:20  
10            relationships, not being able to have any consistency. Well, 12:18:23  
11            because of their impulsivity and because of their poor 12:18:26  
12            decision making, as they become adults they perpetuate that. 12:18:31  
13            They pick the wrong people. But in many ways they pick the 12:18:35  
14            people who will tolerate them. 12:18:40

15            You have to think about this, if I am borderline 12:18:41  
16            and I have all of these characteristics of impulsivity, labile 12:18:42  
17            emotions and poor decision making, and I'm suspicious and I 12:18:46  
18            idealize you one minute and then I reject you the next minute, 12:18:49  
19            who is going to want to be with me? well, the persons who 12:18:52  
20            chose to be with borderlines tend to have their own issues. 12:18:56  
21            oftentimes issues with alcohol and drugs, often issues with 12:19:00  
22            dependency, often their own issues with relationships. And so 12:19:03  
23            what they do is borderlines end up being in dysfunctional 12:19:05  
24            relationships with persons who they end up hurting each other. 12:19:09

25            Q.    Does, because of this personality borderline 12:19:14

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1 personality disorder, he have a reaction to stress? 12:19:18

2 A. Borderlines have a predictable reaction. If you 12:19:20  
3 look at the slide that says Von's reaction to stress. First 12:19:24  
4 of all they overreact. Minor provocation, results in a big 12:19:27  
5 response. Which goes back to the early description of 12:19:32  
6 histrionic in the one evaluation. They exaggerate. Their 12:19:35  
7 response is bigger than it should be. Their emotions are 12:19:41  
8 labile. They swing suddenly and dramatically and that occurs 12:19:44  
9 for Von and they describe it. 12:19:48

10 Suspicious of others, fearful that they are either 12:19:51  
11 going to hurt me or they are going to leave me. And then 12:19:53  
12 intense anger and aggression when they perceive that they have 12:19:56  
13 been wronged. And that is a clear thing about personality 12:20:00  
14 disorders, it's not about what is true, it is about 12:20:05  
15 perceptions. Borderlines frequently misperceive a 12:20:08  
16 relationship. They think that someone is more invested in 12:20:12  
17 them than they really are. They think that someone has made a 12:20:16  
18 commitment that they have not made and then when they perceive 12:20:20  
19 that they have been mistreated, they overreact and their 12:20:23  
20 response can be very aggressive and very angry. 12:20:27

21 Q. The female relationships that we have talked 12:20:33  
22 about, how is that important to Von, the diagnosis you have 12:20:36  
23 made? 12:20:42

24 A. If we take a look at the slide that begins with 12:20:42  
25 female relationships, borderlines look for validation through 12:20:46

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1 | their relationships, if I don't feel that I have a sense of | 12:20:53  
2 | self, and I don't feel, quote, real, then what I do is a latch | 12:20:56  
3 | onto you with the hope that you can make me feel real; that | 12:21:02  
4 | you can give me a sense of identity. The problem is I don't | 12:21:05  
5 | know how to do that. I don't know how to connect. I don't | 12:21:11  
6 | know how to communicate and form intimacy and so, even though | 12:21:14  
7 | I want that, my relationships end up being superficial, most | 12:21:18  
8 | often they are short duration. It's hard for me to have long | 12:21:23  
9 | relationships if I am borderline because of my behavior. | 12:21:27  
10 | Because the minute that I think that you are doing something I | 12:21:30  
11 | reject you. But then the minute you go away I want you back. | 12:21:33  
12 | And so there is just like yo-yo relationship. I love you, you | 12:21:38  
13 | are great, go away, I don't want you. Come back. Come back. | 12:21:41  
14 | And back and forth. | 12:21:45

15 |           And again, most people, even dysfunctional people, | 12:21:46  
16 | after a while get tired of it. And say, yeah, I can't deal | 12:21:49  
17 | with this. I don't want to be a relationship with you | 12:21:51  
18 | anymore. The sexual relationship for borderlines, again, it's | 12:21:54  
19 | a sense of connection. Even if there is no emotional intimacy | 12:21:59  
20 | related it, they confuse the sex with love. And so they will | 12:22:04  
21 | pursue sexual relationships, again, to reinforce that I'm | 12:22:08  
22 | okay, I am a good person, I'm attractive, there is something | 12:22:12  
23 | good about me. | 12:22:15

24 |           Q. Can you explain how some of the same children in | 12:22:17  
25 | the household, with experiencing the same persons, Alluster | 12:22:21

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1 and Nick being there, not there, don't have this borderline  
2 personality disorder to our knowledge, such as Elliot who is  
3 the oldest child, Carol who is the child after Von, and then  
4 Victor who is two children later?

5 A. Again, what we want to keep in mind is each  
6 person's life experience is different. If I am the first  
7 child, my life experience is different. For the first child  
8 Elliot, dad is around for first six years of Von's life, so  
9 they are around for a while with Elliot. Then Nick is gone,  
10 but again, Nick is not a great dad even when he is present,  
11 but he is at least around somewhat. Von experiences the true  
12 abandon by dad. But then, you know, again, it has to do with  
13 what is going on and the individual makeup. Von has problems  
14 in school, some of the others do not have problems in school.

15 Von has difficulties with closeness and  
16 relationships early along, many of the others might not have.  
17 Victor told me that he was very close with his grandmother and  
18 really formed a connection and stayed with her. Von didn't do  
19 that. That didn't happen for him. So again, there are  
20 specific events that can occur which can dramatically change  
21 one person's life experience versus another. And so for Von,  
22 his particular makeup, and the particular things that happened  
23 to him, add up to his having borderline.

24 I mean, we see this at times. You will have three  
25 children in a family, one goes to college, one doesn't. One

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1 gets married and has children, another one doesn't, they grew 12:23:59  
2 up in the same home, had the same parents but they developed 12:24:04  
3 different likes, dislikes, values, and directions for their 12:24:07  
4 life. We expect that. And that is all that has happened 12:24:10  
5 here. Von is a unique individual, he happened to be the 12:24:15  
6 second oldest in this family and the events that occurred 12:24:17  
7 affected him in a unique way based upon his position in the 12:24:21  
8 family and his resources that were available to him as he was 12:24:24  
9 growing up. 12:24:28

10 Q. You have diagnosed him with co-occurring disorder 12:24:29  
11 of the alcohol issue, can you explain how that is impacting on 12:24:34  
12 the borderline personality disorder? 12:24:39

13 A. Yes, if we move ahead, it says co-occurring 12:24:41  
14 disorders, substance abuse and dependence. The fact that you 12:24:45  
15 have borderline personality disorder doesn't mean that you 12:24:47  
16 can't have another disorder. You can have more than one 12:24:51  
17 disorder at a time. And so, that is what I talked about 12:24:55  
18 earlier, this co-occurring happening at the same time one 12:24:56  
19 impacts or interacts with the other. If we go to the next 12:24:59  
20 slide it says substance abuse and mental illness. This is not 12:25:02  
21 as rare as you might think. Seven to ten million individuals 12:25:06  
22 in the United States have both a mental disorder and abuse 12:25:11  
23 alcohol or other drugs. 12:25:15

24 The issue here is in treating people who have both 12:25:16  
25 disorders, you have to have very specially designed treatment 12:25:19

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1 programs. If you treat just one disorder and not the other, 12:25:23  
2 the individual will not be successful in their recovery. At 12:25:27  
3 one point Von had some treatment for his abuse of alcohol, but 12:25:31  
4 there was not a recognition of him having a mental illness, so 12:25:36  
5 as a result, he continued to abuse alcohol. 12:25:39

6 Q. Can you explain if he is not receiving treatment, 12:25:45  
7 it's 2009, and you are making this diagnosis of these 12:25:48  
8 co-occurring disorders, how he has been able to live on death 12:25:52  
9 row and only have one incident since 1990? 12:25:57

10 A. Borderlines and people with alcohol dependence do 12:26:01  
11 very well in a structured environment. If you take an 12:26:05  
12 individual who has a longstanding history of abusing alcohol 12:26:09  
13 and a personality sort of like borderline, and you put them in 12:26:14  
14 a structured environment like prison, well first of all, what 12:26:18  
15 you've done is you've greatly reduced the likelihood that they 12:26:18  
16 can access alcohol and drugs. I am not saying completely, but 12:26:21  
17 you have really reduced it. So now we have taken away one of 12:26:25  
18 the risk factors for them getting into trouble. 12:26:28

19 You have taken away alcohol, you have taken away 12:26:29  
20 drugs. The second thing is, is if I have borderline 12:26:32  
21 personality disorder and my problem is impulsivity, poor 12:26:35  
22 decision making and difficulty with relationships, in a prison 12:26:39  
23 setting, I don't have a lot of decisions to make, I don't have 12:26:45  
24 lots of opportunities to act out and I also don't form lots of 12:26:45  
25 relationships. I am pretty much restricted in what I get to 12:26:49

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1 do, when I get to do it, and I have supervision at all times 12:26:53  
2 regarding what I am doing. Individuals with borderline 12:26:58  
3 personality disorder do very well in that kind of environment. 12:27:01

4 Q. Okay. The borderline personality disorder and 12:27:04  
5 substance abuse issues they affect what part -- do they affect 12:27:09  
6 a specific part of the brain? 12:27:13

7 A. I am trying to think if we can get to a slide that 12:27:17  
8 will sort of help show. If we go ahead, there is a picture of 12:27:24  
9 the brain, it is called drug addiction is a complex illness. 12:27:26  
10 The reason I put that there is that the research has now shown 12:27:31  
11 us that addiction is biological rather than just a behavior. 12:27:37  
12 And if you go to the next slide, it shows various parts of the 12:27:42  
13 brain and the area I would like you to focus in, I believe it 12:27:47  
14 is an orange band in the center of the brain, it is called 12:27:50  
15 reward, if you see that label. 12:27:53

16 The reward center of the brain is responsible for 12:27:56  
17 a number of very important behaviors for human beings. If we 12:28:00  
18 go to the next slide what you will see is that part of the 12:28:06  
19 brain is responsible for hunger, thirst, and sexual drive. 12:28:10  
20 Okay. The reward center of the brain is activated and we feel 12:28:15  
21 thirsty, it's activated we feel hungry, it's activated and we 12:28:20  
22 feel that we would like to have a sexual relationship with 12:28:23  
23 someone. All of those are basic parts of human behavior for 12:28:26  
24 survival. We don't eat, we don't drink, we don't have sex, we 12:28:30  
25 die, the human race goes away. Okay. So these are hard wired 12:28:35

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1 drives. These are cravings which we have, which are very, 12:28:39  
2 very intense. It's not just I want or I would like, but I 12:28:43  
3 need. 12:28:47

4 Okay. I need food, I need water. We are wired 12:28:47  
5 that way. And if we go for an extended period without water 12:28:51  
6 or food we will become very desperate to meet that need. What 12:28:56  
7 becomes important about addiction, is we have now been able to 12:29:01  
8 demonstrate, if you go to the next slide, that the reward 12:29:04  
9 center is what is activated when an individual develops an 12:29:08  
10 addiction to alcohol or drugs. So rather than an alcoholic 12:29:11  
11 wanting or liking alcohol, that in fact their perception is 12:29:17  
12 that they need alcohol. That they must have it. That they 12:29:23  
13 crave it like a person craves food and water. So if we begin 12:29:29  
14 to look at it that way and understand the research, it makes 12:29:33  
15 it clearer why people drink even though it will destroy their 12:29:36  
16 relationships, may cause them to lose their job, may cause 12:29:41  
17 them to have multiple legal involvement, it gives us a better 12:29:44  
18 understanding. Still can be treated, but what we are 12:29:48  
19 recognizing is that this is not just a behavior that someone 12:29:50  
20 is choosing to repeatedly get into trouble with their use of 12:29:55  
21 alcohol and drugs. 12:29:58

22 If you take a look at the next slide, there is 12:29:59  
23 actually a picture of a rat, what they are showing here is a 12:30:02  
24 study which was done in which they gave the rat an opportunity 12:30:08  
25 to press a bar, and that is sort of standard study that we do 12:30:09

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1 with rats. We teach them to press a bar and they get a food 12:30:13  
2 pellet. Press the bar they get a food pellet. And then we 12:30:13  
3 can also teach them to press another bar and they get an 12:30:19  
4 amount of water. And so there is a little water tube and they 12:30:21  
5 get to lick and get some water, they can eat a food pellet and 12:30:24  
6 it's a happy rat. Food and water any time they want, all they 12:30:27  
7 have to do is press the bar. Then what they did is they took 12:30:30  
8 and they put in a third bar. The third bar, would administer 12:30:32  
9 alcohol directly to the reward center of the brain. So now 12:30:36  
10 the rat can get a little food, a little water and a little 12:30:40  
11 alcohol; a little food, a little water and a little alcohol. 12:30:44

12 In the beginning, that is exactly what the rat 12:30:46  
13 does, samples all three. As the rat develops an addiction to 12:30:48  
14 the alcohol, he will use less food and less water up to the 12:30:52  
15 point in which in the end the rat will die from dehydration 12:30:58  
16 and starvation when all he has to do is press the bar to get 12:31:02  
17 food and water, but he won't, he just keeps 12:31:06  
18 self-administrating the alcohol. 12:31:11

19 Again, demonstrating the control of this reward 12:31:13  
20 center and how alcohol and drugs affect the choices that are 12:31:16  
21 made once that area is activated. 12:31:19

22 Q. One of your specialties is addiction, I had a 12:31:22  
23 slide on and I skipped ahead. Is there anything about 12:31:26  
24 addiction in regards to Von that is important for this Court 12:31:28  
25 to understand from back in 1983? 12:31:31

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1           A. I think what is important regarding Von's use of 12:31:35  
2 alcohol is that he starts around age 15. 12:31:38

3           MR. OSTER: Your Honor, he said we skipped around, 12:31:42  
4 can I just ask what the title of this slide is? 12:31:44

5           A. Okay. I was just going to summarize it, we can go 12:31:47  
6 to one of the slides. Let's go to the one that says Von's 12:31:52  
7 alcohol use. He begins using alcohol around age 16, abusing 12:31:52  
8 by age 17. He demonstrates an increase in tolerance while he 12:32:02  
9 is in the Navy, he shifts from beer to beer and hard liquor as 12:32:07  
10 he gets older. He progresses to points in which it is near 12:32:11  
11 daily consumption of alcohol. He drank during incarceration 12:32:15  
12 at various points when there was the hootch made inside the 12:32:22  
13 prison. 12:32:23

14           And upon release, he resumed his use of alcohol 12:32:24  
15 and drugs. He has no significant treatment for his addiction 12:32:28  
16 to alcohol. If we go to the next slide what we show is 12:32:31  
17 because this is a biological condition, we know that genetics 12:32:36  
18 plays a role, and what we know in Von's history is that his 12:32:41  
19 father, his two brothers, his half-brother and several 12:32:44  
20 maternal uncles and aunts all had problems with their use of 12:32:49  
21 alcohol. And so again, it shows a family genetic influence or 12:32:54  
22 predisposition to developing a problem with alcohol. 12:32:59

23           If we go back to the slide following the rat, I 12:33:05  
24 just wanted to emphasize that alcohol is a central nervous 12:33:11  
25 system depressant. It changes the functions of the brain so 12:33:16

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1 | there is a distortion of our senses. Individuals when they | 12:33:20  
2 | are intoxicated can misperceive things, they may have impaired | 12:33:26  
3 | memory for the events that occurred. They may have severe | 12:33:30  
4 | mood swings or labile emotion. They can become irritable and | 12:33:34  
5 | aggressive, they can have difficulty concentrating and | 12:33:38  
6 | attending. Oftentimes they are impulsive and they react to | 12:33:44  
7 | situations in unpredictable ways, and they demonstrate poor | 12:33:48  
8 | judgment and poor decision making. | 12:33:52

9 | If we go to the next slide, the key here is again | 12:33:58  
10 | the co-occurring disorders. As I was going through the | 12:34:02  
11 | impairments related to alcohol, many of those impairments are | 12:34:06  
12 | identical to the impairments that a borderline personality | 12:34:10  
13 | disorder experiences without any use of alcohol. So now, if | 12:34:13  
14 | we combine those two, both alcohol and borderline personality | 12:34:16  
15 | disorder, the impairments are exacerbated and there is a | 12:34:19  
16 | synergy between the two disorders. And so you have an | 12:34:23  
17 | individual who now is more impaired than if they had the one | 12:34:27  
18 | disorder alone. | 12:34:31

19 | Q. Okay. Couple of follow up questions relative to | 12:34:34  
20 | your education and then two more questions and I will be done. | 12:34:38  
21 | You gave us a description of what your current employment | 12:34:41  
22 | background is, you also do some work with the Ohio Department | 12:34:45  
23 | of Rehabilitations and Corrections; is that correct? | 12:34:49

24 | A. That's correct. | 12:34:50

25 | Q. And what is that? | 12:34:50

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1           A. I have worked with ODRC in several capacities. 12:34:51  
2     Picaway Prison has a therapeutic community as part of the 12:34:56  
3     prison. And so what I did is I worked with the clinical staff 12:35:01  
4     as a consultant to help them install a therapeutic community 12:35:05  
5     within the prison. I have also done training for staff with 12:35:09  
6     ODRC regarding cognitive behavioral therapy and criminogenic 12:35:14  
7     thinking, so that, again, I have had an ongoing relationship 12:35:19  
8     with them. 12:35:23

9           Q. Okay. Sometimes you are asked by prosecutors that 12:35:23  
10    you are simply a hired gun, what is your response to that? 12:35:27

11          A. My opinion is my opinion based upon the 12:35:31  
12    information that I have. There is no amount of money that 12:35:37  
13    will influence what my opinion is. This is only one part of 12:35:39  
14    what I do. It's part of my career. It is a small part of 12:35:43  
15    what I do. But I think it's an important part. Everything 12:35:46  
16    that I do is a reflection upon my character and my profession 12:35:50  
17    and so what I offer today is based upon the information I had 12:35:53  
18    available to me from Von, from his family, the records, and I 12:35:57  
19    feel is a reflection of the information, not a reflection of 12:36:02  
20    how much I am getting paid or why I am here. 12:36:07

21          Q. And my last question revolves around the issue of 12:36:10  
22    blame game. Lots of times people say in psychology and 12:36:15  
23    psychiatry you are just simply blaming someone else for 12:36:18  
24    someone's actions. Is that what you are doing here with your 12:36:20  
25    diagnosis? 12:36:23

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1	A. No, this is not an excuse for Von. This is an	12:36:23
2	explanation and understanding. In fact, I suppose it is	12:36:27
3	important to note that Von made it very clear to me the very	12:36:33
4	first time that I met him that he had no indication or desire	12:36:36
5	to excuse what he did. That he was going to acknowledge that	12:36:39
6	and own that completely. This does not excuse. This is an	12:36:43
7	explanation. This is an understanding of how this could	12:36:49
8	happen. why it might have happened. But again, we are not	12:36:52
9	trying to blame Alluster or Nick but they play a role, just as	12:36:56
10	they play a role in all of our lives. Our parents are	12:37:01
11	influences. And someone who has a mental disorder, if we are	12:37:04
12	going to understand their choices and their behavior, we have	12:37:10
13	to understand what that disorder is and how it played a role.	12:37:13
14	MS. COOK-REICH: I have no further questions.	12:37:16
15	JUDGE NASTOFF: All right. Thank you. Given the	12:37:19
16	hour, it is 12:37, by my clock, by the Court clock.	12:37:24
17	Briefly conferring with the other Judges, why don't we	12:37:32
18	take approximately a 45 minute lunch break. Is there	12:37:35
19	anyone from that side that can't live with a 15 minute	12:37:39
20	shorter lunch today?	12:37:43
21	MS. COOK-REICH: I could live with a five minute	12:37:45
22	lunch.	12:37:48
23	MR. OSTER: I couldn't live with a five minute	12:37:48
24	lunch, Your Honor.	12:37:50
25	JUDGE NASTOFF: It's that whole reward center	12:37:50

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1 thing. All right. So let's call it 45 minutes. That 12:37:53  
2 would bring us back, well, do the math, I'm showing 12:37:57  
3 about 25 after. We will be in recess until that time. 12:38:01  
4 Doctor, I want to remind you that since you are in 12:38:07  
5 midstream of your testimony, you are not to discuss 12:38:10  
6 your testimony with any other person until your 12:38:13  
7 testimony is completed, and then I will -- we will 12:38:14  
8 either re-swear you or remind you that you are still 12:38:18  
9 under oath when we return. 12:38:22

10 THE WITNESS: That's fine, Your Honor. 12:38:23

11 JUDGE NASTOFF: All right. We are in recess. 12:38:25

12 (Recess taken at this time.) 12:38:31

13 JUDGE NASTOFF: We are back on record. State of 01:34:02  
14 Ohio vs. Von Clark Davis, CR1983-12-0614. Again 01:34:08  
15 present in person is the defendant, Von Clark Davis, 01:34:13  
16 with his counsel, Randall Porter, Melynda Cook-Reich. 01:34:15  
17 They also have a technological assistant present at 01:34:20  
18 counsel table, sorry I don't know your name. 01:34:23

19 MS. RECTOR-COWSER: Nancy Rector-Cowser. 01:34:29

20 JUDGE NASTOFF: All right. And with the public 01:34:29  
21 defender's office. And then also present for the State 01:34:30  
22 are assistant prosecutors Dan Eichel, Mr. Oster. Our 01:34:32  
23 witness, Dr. Smith is on the stand, all members of the 01:34:38  
24 three-judge panel are present. 01:34:40

25 Dr. Smith, before we pick up with 01:34:42

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1	cross-examination, I would simply remind you that you	01:34:43
2	remain under oath from your earlier testimony.	01:34:47
3	THE WITNESS: Yes.	01:34:50
4	JUDGE NASTOFF: Thank you. Does the State have	01:34:50
5	cross-examination?	01:34:53
6	MR. EICHEL: Yes, Your Honor.	01:34:55
7	JUDGE NASTOFF: You may proceed.	01:34:57
8	CROSS-EXAMINATION	01:34:57
9	BY MR. EICHEL:	01:34:59
10	Q. Dr. Smith, good afternoon.	01:34:59
11	A. Good afternoon, sir.	01:35:03
12	Q. My name is Dan Eichel. I'm assistant prosecuting	01:35:04
13	attorney here in Butler County.	01:35:08
14	A. Nice to meet you, Mr. Eichel.	01:35:09
15	Q. Sir, you stated you are in private practice as a	01:35:12
16	licensed clinical psychologist and a certified -- let me make	01:35:15
17	sure I have the title correct, I thought it was certified	01:35:20
18	chemical dependency consultant?	01:35:23
19	A. Certified addiction specialist, very similar.	01:35:25
20	Q. Certified addiction specialist, okay. And you	01:35:28
21	have been a licensed clinical psychologist since 1983?	01:35:31
22	A. That's correct.	01:35:36
23	Q. Private practice since 1993?	01:35:37
24	A. No, before that.	01:35:41
25	Q. Before that? Okay. And it's generally in the	01:35:43

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1	Cleveland area?	01:35:49
2	A. Yes.	01:35:50
3	Q. All right. Sir, you have had occasion to testify	01:35:51
4	how many times in capital cases in Ohio or anywhere for that	01:35:57
5	matter?	01:36:03
6	A. I was going to say overall I think over the last	01:36:04
7	15 years it's been maybe 40 times, something like that.	01:36:08
8	Q. Okay. In the -- it's four years ago, but in 2005,	01:36:11
9	do you remember testifying in the Trumbull case?	01:36:16
10	A. I remember the name, yes.	01:36:18
11	Q. And in that case, you testified that you had	01:36:20
12	occasion to testify 20 to 25 times as a defense witness in	01:36:25
13	capital cases.	01:36:30
14	A. That may be.	01:36:32
15	Q. And so you have testified more in the past four	01:36:33
16	years; is that correct?	01:36:41
17	A. I testified in the last four years, that's	01:36:41
18	correct.	01:36:43
19	Q. Is it true now as it was then that you have never	01:36:43
20	been asked to testify as a prosecution witness?	01:36:49
21	A. That is correct.	01:36:51
22	Q. And you have testified in approximately 15 to 20	01:36:53
23	states you said?	01:36:59
24	A. Yes, I believe that is true.	01:37:01
25	Q. All for the defense?	01:37:01

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1 A. That is correct. 01:37:03

2 Q. Sir, I am sure -- well, strike that. Have you had 01:37:04  
3 prior case assignments where you have been retained to 01:37:14  
4 evaluate an individual for the Ohio Public Defender's staff? 01:37:20

5 A. I have worked on cases with the Ohio Public 01:37:25  
6 Defender before; that is correct. 01:37:28

7 Q. Okay. And how about Mr. Porter in this case, any 01:37:30  
8 prior contact? 01:37:33

9 A. I don't believe we have ever worked on a case 01:37:35  
10 before. 01:37:38

11 Q. Okay. Fair enough. In this case you began your 01:37:39  
12 work when? 01:37:42

13 A. I think I was contacted the last part of 2008. So 01:37:42  
14 I may have received materials in early 2009. 01:37:49

15 Q. And according to your previous testimony, your 01:37:53  
16 purpose -- well, one thing you did, you did it twice, you 01:37:57  
17 interviewed the defendant twice in March, I believe and then 01:38:04  
18 April, I believe you listed the dates in the outline? 01:38:08

19 A. That's correct, yes. 01:38:15

20 Q. Okay. And in this case, you were subpoenaed to 01:38:16  
21 complete and your work was done in April; is that correct? 01:38:24

22 A. No. I did the collateral interviews, the family 01:38:28  
23 members in May. 01:38:32

24 Q. In May. Were you -- you were subpoenaed and ready 01:38:33  
25 to testify at an earlier date; is that correct? 01:38:39

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1	A.	Yes.	01:38:43
2	Q.	which didn't happen?	01:38:44
3	A.	That is correct.	01:38:45
4	Q.	Curious when did you put together the PowerPoint?	01:38:47
5	A.	You know, I don't know the date of that.	01:38:54
6	Q.	Okay. Certainly something you don't do overnight?	01:38:56
7	A.	No. No, I took time to put that together; is that	01:39:01
8		correct.	01:39:03
9	Q.	Okay. Did you otherwise author a written report	01:39:04
10		in this case?	01:39:12
11	A.	No, I did not.	01:39:12
12	Q.	And why is that?	01:39:13
13	A.	I wasn't requested to do a written report.	01:39:15
14	Q.	You have authored reports in other cases?	01:39:18
15	A.	When it has been requested I have always provided	01:39:22
16		that, that is correct.	01:39:24
17	Q.	And for instance, in Trumbull, there's reference	01:39:25
18		that you did author a written report in that case, it just	01:39:29
19		wasn't offered into evidence?	01:39:33
20	A.	I believe that is true, yes.	01:39:34
21	Q.	Okay. And you stated you worked in Montgomery	01:39:36
22		County, testified in Montgomery County, was that on the	01:39:44
23		Singleton case?	01:39:44
24	A.	I believe so.	01:39:45
25	Q.	And you authored no report in that one?	01:39:46

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1	A.	I don't recall, to be honest with you.	01:39:50
2	Q.	And <i>State vs. Morales</i> , I'm not sure the first	01:39:52
3		name, do you recall Morales?	01:39:59
4	A.	That was a long time ago, yes.	01:40:01
5	Q.	Long time ago. No report in that case?	01:40:03
6	A.	I don't recall. Don't recall.	01:40:06
7	Q.	Fair enough. But you wouldn't call the PowerPoint	01:40:07
8		a report?	01:40:13
9	A.	It's a summary of my findings and of my opinion.	01:40:14
10	Q.	It contains everything that would be in a report,	01:40:18
11		does it not?	01:40:20
12	A.	Basically, yes.	01:40:21
13	Q.	Now, I gather from your previous testimony, to the	01:40:23
14		best of your knowledge, your training, and your ability, to do	01:40:29
15		the best job possible in your line of endeavor, you need to	01:40:33
16		collect all information available to you as to Mr. Davis?	01:40:38
17	A.	You want to be as -- you know, review as much	01:40:43
18		material as you can get your hands on, yeah.	01:40:46
19	Q.	And put it in your words, a rounded picture?	01:40:48
20	A.	Yeah, I wanted to see a longitudinal picture not	01:40:51
21		just a snapshot.	01:40:54
22	Q.	And that you said included review of the trial	01:40:55
23		testimony in this case?	01:41:01
24	A.	Yes.	01:41:02
25	Q.	That included the trial testimony of the	01:41:03

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1	defendant, himself, as to his conduct on December 12, 1983?	01:41:05
2	A. Yes.	01:41:10
3	Q. That included reviewing the trial testimony of	01:41:11
4	those who testified at that trial in 1984 and observed what	01:41:14
5	they testified to be defendant's conduct on the night in	01:41:20
6	question?	01:41:24
7	A. Yeah, I reviewed that, that is correct.	01:41:24
8	Q. And on the day in question for that matter,	01:41:26
9	talking about two witnesses, Mark Lovette and Wade Coleman; is	01:41:28
10	that correct?	01:41:34
11	A. That is correct.	01:41:34
12	Q. And you have reviewed those things?	01:41:35
13	A. I have.	01:41:36
14	Q. The testimony of Reginald Denmark, Hosette Massie	01:41:37
15	and Mona Aldridge on that evening?	01:41:44
16	A. Again, I reviewed those documents, I don't	01:41:47
17	remember the specifics of the entire document.	01:41:49
18	Q. Okay. A gentleman who testified that he saw the	01:41:51
19	actual murder take place on the street?	01:41:55
20	A. Again, I remember reviewing the document, I don't	01:41:58
21	remember all of the specifics.	01:42:02
22	Q. Okay. And of course all of the documentary file	01:42:03
23	of the correctional institution on Mr. Davis?	01:42:14
24	A. Yes.	01:42:19
25	Q. Every page of it?	01:42:20

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1 A. What I was provided I reviewed. 01:42:22

2 Q. You interviewed some family members that -- in 01:42:24  
3 May; is that correct? 01:42:34

4 A. That is correct. 01:42:35

5 Q. And you have listed those. Others you listed the 01:42:35  
6 statements that you reviewed? 01:42:39

7 A. That is correct. 01:42:41

8 Q. Is it fair to say that other than Mr. Davis 01:42:42  
9 himself, everyone you talked to was a supportive, indeed a 01:42:46  
10 loving family member of Mr. Davis motivated to give you a 01:42:49  
11 history that would help, rather than hurt his cause in 01:42:54  
12 mitigation? 01:42:57

13 A. I know that they appeared to be open, honest, 01:42:59  
14 direct, they responded to my questions in what seemed to be a 01:43:04  
15 spontaneous and genuine manner. I think at different points 01:43:09  
16 some of them expressed concern and caring for him. 01:43:18

17 Q. And Mr. Davis as a capitally charged individual, 01:43:22  
18 is it fair to say that he is motivated to help himself? 01:43:29

19 A. That was the part that I was talking about 01:43:33  
20 earlier. I'm not so sure that when I met with him he was all 01:43:36  
21 that motivated to helping himself. Certainly he did not view 01:43:40  
22 his alcohol use as much as a problem as I did. He certainly 01:43:46  
23 didn't think that he had any type of personality disorder nor 01:43:51  
24 did he suggest that at any point. Nor did he emphasize any 01:43:55  
25 kind of problems or symptoms. The key thing that he 01:43:58

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1 emphasized was that he did not want this trial to cause pain  
2 for himself, for his family and for the victim's family.

3 Q. Now, it's fair to say in the testimony you  
4 reviewed of the family members, they painted a picture in 1984  
5 of a caring family, a close family, a supportive family; is  
6 that correct?

7 A. I think there was some characterizations that  
8 would fit that, yes.

9 Q. And would it surprise you that they testified  
10 exactly that same way here in court this year?

11 A. No. It would not surprise me.

12 Q. How did the history of the offense that Mr. -- you  
13 did take a history of the actual offense from Mr. Davis, did  
14 you not?

15 A. That is correct.

16 Q. How did it square with his testimony back in 1984?

17 A. What he told me when I interviewed him was that he  
18 committed the murder.

19 Q. So that is absolutely altogether different than  
20 his testimony where he was asked, did you commit this murder  
21 and he said absolutely not?

22 A. That's correct.

23 Q. He didn't tell you about the coincidence that he  
24 purchased the murder weapon for a Silkey Carr?

25 A. No, he never indicated that Silkey Carr was a part

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1 of this offense. 01:45:52

2 Q. Didn't tell you the dental equipment, a deal for 01:45:53  
3 dental equipment with Silkey Carr was the reason he purchased 01:46:00  
4 the gun and went out and got the ammunition too? 01:46:04

5 A. He described getting the gun and having a friend 01:46:07  
6 purchase the gun and the ammunition with him. But again, no 01:46:11  
7 in reference to Silkey Carr. 01:46:14

8 Q. And he did not tell you that he left that same 01:46:18  
9 man, Silkey Carr, at the door with Suzette Butler, a woman who 01:46:24  
10 he said he loved, at the door of the American Legion, got into 01:46:29  
11 his car and drove to Middletown? 01:46:33

12 A. No, he never said those things at all. 01:46:36

13 Q. I guess he did not tell you as he told Dr. Fisher 01:46:38  
14 that the witnesses who testified against him testified falsely 01:46:51  
15 because they wanted the limelight? 01:46:55

16 A. No. He specifically said that he was the person 01:46:59  
17 who killed Suzette. 01:47:00

18 Q. Did he tell you as he did in the 1984 trial he 01:47:02  
19 drank beer in the car three to four hours before the shooting, 01:47:10  
20 had another beer when he was walking around town, strolling 01:47:16  
21 around town, I believe he said, had normal conversation with 01:47:20  
22 people, bought them drinks at the American Legion, and had a 01:47:25  
23 sip of his drink at the Legion just before he went outside 01:47:30  
24 with Suzette Butler? 01:47:34

25 A. That is a fair description. He indicated that he 01:47:37

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1	consumed some amount of beer and hard liquor prior.	01:47:41
2	Q. Did you question him as to why he would make up	01:47:45
3	the story he did in 1984?	01:47:50
4	A. He was open about that, said that he was being	01:47:53
5	dishonest.	01:47:57
6	Q. And he obviously, from Dr. Fisher's report, he	01:47:58
7	told the same story to Dr. Fisher after he was found guilty;	01:48:09
8	is that correct?	01:48:13
9	A. That's my understanding.	01:48:13
10	Q. And in that not only once, but twice he denied	01:48:15
11	alcohol or drug use, even after the verdict of guilty to Dr.	01:48:20
12	Fisher?	01:48:24
13	A. I believe that is correct.	01:48:24
14	Q. Dr. Smith, your conclusion that this is a	01:48:26
15	borderline personality disorder, is that what back in the old	01:48:37
16	days, maybe back before there was a DSM-I, personality	01:48:45
17	disorder was called a neurosis?	01:48:51
18	A. No.	01:48:54
19	Q. No?	01:48:55
20	A. No. Most of the neuroses were based upon anxiety	01:48:56
21	disorders. Personality disorders were in separate -- those	01:49:01
22	actually were identified during World War I, where they began	01:49:04
23	to recognize that individuals had personality styles that	01:49:09
24	repeatedly caused them difficulties in all areas of their	01:49:12
25	life. Personality disorder is much more severe disorder than	01:49:16

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1 a neurosis.

01:49:22

2 Q. But not so severe that it is a psychosis; is that  
3 correct?

01:49:22

01:49:28

4 A. Yes, you would not say that they are hallucinating  
5 or delusional but they have misperception of reality though.

01:49:28

01:49:33

6 Q. And you get psychosis, that severity with organic  
7 brain syndrome, one example of it?

01:49:38

01:49:42

8 A. You can in schizophrenia which is a biological  
9 disorder, you have both hallucinations and delusions.

01:49:45

01:49:50

10 Q. Paranoid state, that is a major mental illness,  
11 psychosis?

01:49:53

01:49:56

12 A. Well, paranoia is a symptom and a schizophrenic  
13 could have a paranoid delusion.

01:49:59

01:50:01

14 Q. Other affective psychoses, such as, what are they?

01:50:04

15 A. The -- there are some affective disorders that can  
16 have a psychotic feature so that you could have a bi-polar  
17 disorder with psychotic features.

01:50:10

01:50:14

01:50:18

18 Q. And psychotic features -- well, what we are  
19 talking about is a major mental illness such as to invoke the  
20 legal definition of insanity; is that correct?

01:50:21

01:50:24

01:50:32

21 A. Well, not necessarily. Again, if we get to the  
22 legal definition of insanity, a person could actually be  
23 psychotic and still appreciate what they are doing is wrong,  
24 so I mean it really depends upon the circumstances and the  
25 specific facts of that case whether or not at the time of the

01:50:35

01:50:38

01:50:42

01:50:46

01:50:49

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1 offense their mental disorder was so severe that they could 01:50:51  
2 not appreciate that what they were doing was wrong. 01:50:56

3 Q. So you concluded in your direct testimony, I 01:50:58  
4 believe, by saying you are not saying that Von Clark Davis on 01:51:07  
5 December 12, 1983 was suffering from such a mental disease or 01:51:11  
6 defect that he could not know the difference between right and 01:51:17  
7 wrong? 01:51:21

8 A. That is correct. I'm not saying that he was 01:51:21  
9 legally insane. 01:51:24

10 Q. Nor are you saying that he on that date, December 01:51:25  
11 12, 1983 was suffering from such a mental disease or defect 01:51:30  
12 that rendered him incapable of refraining from the commission 01:51:34  
13 of the wrongful act? 01:51:38

14 A. No, I am saying that it was diminished capacity 01:51:40  
15 and impairment. 01:51:44

16 Q. And basically it is the facts of this case that 01:51:44  
17 you have to rule out irresistible impulse because it is not 01:51:50  
18 there; isn't that correct? 01:51:55

19 A. I would need you to define what you mean by 01:51:56  
20 irresistible impulse. 01:52:00

21 Q. Well, he was not impelled by the mental disease to 01:52:02  
22 do this? 01:52:08

23 A. It played a role. It is my belief that 01:52:09  
24 borderlines act out based upon circumstances and at those 01:52:15  
25 moments their perception or misperception of the situation is 01:52:19

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1 a significant factor leading them to decide to act out. 01:52:22

2 Q. Well, if a person takes four hours or so to 01:52:27  
3 develop prior calculation and design to kill someone, that is 01:52:34  
4 not what we understand to be an irresistible impulse? 01:52:39

5 A. Again, I am not sure I understand exactly the 01:52:47  
6 definition of irresistible impulse. What I am saying is that 01:52:52  
7 a mental illness can certainly take several hours or days of 01:52:53  
8 planning if a person is responding to a misperception and 01:52:58  
9 their misperception is caused by their mental illness. They 01:53:02  
10 are acting based on what they believe to be true, so it may 01:53:07  
11 take them a period of time to act upon it, but they are still 01:53:10  
12 acting on something that is a result of their mental illness. 01:53:13

13 Q. Well, what you are talking about it sounds to me 01:53:15  
14 like, correct me if I am wrong, you are talking about a 01:53:19  
15 hypothetical situation where a person believes something not 01:53:23  
16 to be true, such as the president of the United States is out 01:53:29  
17 to get me, therefore, I have to get him first? 01:53:33

18 A. That would be an example of that, yes. 01:53:36

19 Q. And then you could plan out to kill that person? 01:53:39

20 A. That's correct. 01:53:42

21 Q. Now, your answer to the blame game question is 01:53:42  
22 that this is not an excuse, but an explanation and 01:53:51  
23 understanding; is that correct? 01:53:56

24 A. That's correct. 01:53:57

25 Q. Your scenario, your testimony, explains the 01:53:58

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1	evidence of prior calculation and design?	01:54:05
2	A. I think it explains the motive, the rationale, the	01:54:08
3	reasoning, the thought process behind the behavior, yes.	01:54:13
4	Q. Now, you are not saying he had no choice, are you?	01:54:17
5	A. No.	01:54:20
6	Q. He had a choice and he made that choice; is that	01:54:23
7	correct?	01:54:27
8	A. He made choices based upon his perceptions and his	01:54:27
9	beliefs, that's correct.	01:54:31
10	Q. And to be fair, what you are truly saying is your	01:54:31
11	testimony explains why he was at risk to make a bad choice?	01:54:35
12	A. Well, why he would make those kinds of choices	01:54:41
13	given those circumstances, that's correct.	01:54:44
14	MR. EICHEL: I believe that's all I have.	01:54:57
15	JUDGE NASTOFF: Any redirect for Dr. Smith?	01:54:58
16	MR. PORTER: We have a matter we need to approach	01:55:09
17	the Court with and we ask that Dr. Smith be excused	01:55:11
18	while we approach the Court.	01:55:14
19	JUDGE NASTOFF: Temporarily?	01:55:16
20	MR. PORTER: Temporarily.	01:55:19
21	JUDGE NASTOFF: Doctor, your testimony is complete	01:55:20
22	for the time being, but apparently there may be some	01:55:22
23	further need. So at this time you are excused, but I	01:55:24
24	just --	01:55:28
25	MS. COOK-REICH: I do have questions for him.	01:55:28

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1       There is something we need to discuss outside of his       01:55:31  
2       presence to the Court.       01:55:32

3               JUDGE NASTOFF: You remain under subpoena, so just       01:55:32  
4       wait outside, thank you.       01:55:33

5               MS. COOK-REICH: Sorry, that wasn't clear.       01:55:34

6               (Witness left the courtroom.)       01:55:39

7               JUDGE NASTOFF: Yes, Mr. Porter.       01:55:47

8               MR. PORTER: I believe ethically I have an       01:55:48  
9       obligation as a member of the Court, Dr. Smith       01:55:50  
10       testified in one question, I believe I have a duty,       01:55:55  
11       since I have personal knowledge to notify the Court at       01:55:59  
12       this time so the prosecution can, in fact,       01:56:04  
13       cross-examine the doctor if they want. Approx -- and I       01:56:06  
14       cannot remember the exact phrasing of the prosecutor's       01:56:09  
15       question, it was with respect to if Dr. Smith and I had       01:56:12  
16       ever worked together on a case previously. This is, I       01:56:17  
17       don't know, I can't remember how the question was       01:56:22  
18       phrased, I did not retain the doctor on the case. I       01:56:24  
19       became involved about 12 or 14 years later. There was       01:56:28  
20       a hearing in the federal court before Chief Magistrate       01:56:33  
21       Judge Mers, and I was not the one that direct examined       01:56:36  
22       him, but I was one of the two counsel of record. And I       01:56:41  
23       did help prepare him for his testimony.       01:56:45

24               JUDGE NASTOFF: What case was that?       01:56:47

25               MR. PORTER: It would be *Landrum vs. Anderson*,       01:56:48

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1 which currently was argued in the 6th Circuit in late 01:56:54  
2 April. 01:56:59

3 JUDGE NASTOFF: All right. Okay. So what you are 01:56:59  
4 indicating is that him testifying that he did not 01:57:01  
5 recall working with you, or whatever his testimony was, 01:57:04  
6 is incorrect because there was one instance of you 01:57:08  
7 working together on a case? 01:57:11

8 MR. PORTER: Yes, and I believe I have an ethical 01:57:13  
9 duty to so inform the Court, Your Honor, and that would 01:57:15  
10 also, calling it to the Court's attention at this time 01:57:17  
11 certainly would give the prosecution time to 01:57:20  
12 cross-examine him with respect to his answer. 01:57:25

13 JUDGE NASTOFF: Fair enough. All right. And 01:57:29  
14 independent of what he has raised, you have some 01:57:31  
15 redirect examination questions? 01:57:33

16 MS. COOK-REICH: I just have a few. 01:57:35

17 JUDGE NASTOFF: Before she gets to her redirect 01:57:36  
18 then I guess what Mr. Porter is indicating and where I 01:57:38  
19 think we are is that if you wish to cross-examine the 01:57:41  
20 doctor about his recall of having worked with Mr. 01:57:45  
21 Porter, then you have an opportunity to do that and 01:57:48  
22 that is up to you. 01:57:51

23 MR. EICHEL: Your Honor, please, I appreciate the 01:57:53  
24 disclosure, and I have no problem with it. 01:57:55

25 JUDGE NASTOFF: All right. 01:57:58

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1	MR. EICHEL: I have no further questions.	01:57:58
2	JUDGE NASTOFF: Fair enough.	01:58:00
3	MR. PORTER: I just didn't want anyone to believe	01:58:02
4	that I had sat here in silence and mislead the Court or	01:58:04
5	misled the prosecutor's office by my silence.	01:58:08
6	MR. EICHEL: We are good with that.	01:58:10
7	JUDGE NASTOFF: No one believes that. Thank you.	01:58:12
8	JUDGE PATER: Thank you, Mr. Porter.	01:58:13
9	JUDGE NASTOFF: All right. Let's go ahead and	01:58:15
10	bring Dr. Smith back in. And it's my understanding	01:58:16
11	that cross is concluded and we are in redirect.	01:58:19
12	(Witness returned to the witness stand.)	01:58:46
13	JUDGE NASTOFF: Again, I will remind you that you	01:58:46
14	remain under oath. Cross-examination is complete, but	01:58:47
15	I believe there is some redirect examination for you.	01:58:50
16	THE WITNESS: Very good.	01:58:53
17	REDIRECT EXAMINATION	01:58:53
18	BY MS. COOK-REICH:	01:58:54
19	Q. Dr. Smith, do you recall a case called <i>Landrum vs.</i>	01:58:54
20	<i>Anderson</i> ?	01:58:59
21	A. I remember the name a little bit, yes.	01:59:00
22	Q. Do you recall whether you worked with Randall	01:59:02
23	Porter on that particular case from the Ohio Public Defender's	01:59:05
24	office?	01:59:06
25	A. It could be.	01:59:08

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1	Q. Might have slipped your mind?	01:59:09
2	A. Yes.	01:59:11
3	Q. Mr. Eichel asked you some questions about never	01:59:11
4	been -- never having testified for a prosecutor before?	01:59:16
5	A. That is correct.	01:59:19
6	Q. Have you ever been asked by a prosecutor to	01:59:19
7	consult on a case?	01:59:23
8	A. No, I have not.	01:59:23
9	Q. Have you ever been asked then to testify?	01:59:23
10	A. No.	01:59:26
11	Q. Okay. Mr. Eichel asked you questions relative to	01:59:26
12	the -- I believe the first setting of this trial, which was in	01:59:31
13	May of 2009. Have you had any contact from the prosecutor at	01:59:35
14	all except for standing here in court?	01:59:42
15	A. No, I have not had any contact with them.	01:59:43
16	Q. So if they were disclosed your phone number on	01:59:45
17	your curriculum vitae, which is an exhibit here in this case	01:59:48
18	as discovery, they had your exact phone number?	01:59:52
19	A. Yes, that is my address and phone number, all of	01:59:55
20	that is accurate.	01:59:57
21	Q. And I assume have you ever Googled your name and	01:59:58
22	found yourself on the internet?	02:00:01
23	A. Yeah, I have done that, I have to admit.	02:00:03
24	Q. Mr. Eichel was asking you questions relative to	02:00:05
25	family members wanting to provide assistance and help von out	02:00:15

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1 in this case?

02:00:20

2 A. Yes.

02:00:21

3 Q. When you interviewed the family, were they  
4 forthcoming with all of their faults and problems in their  
5 lives?

02:00:22

02:00:25

02:00:30

6 A. No. I mean, again, you have to understand there  
7 is a certain amount of gathering information, and families  
8 don't know what is dysfunctional and what is not oftentimes.  
9 They don't know what behaviors were, you know, destructive to  
10 children growing up. What they were able to do is answer my  
11 questions, so if I asked how many, you know, partners did your  
12 mother have, were their times when you were with other family  
13 members because your mother was away, they answered those  
14 clearly and directly, but they weren't necessarily painting  
15 that as a negative thing.

02:00:30

02:00:33

02:00:39

02:00:42

02:00:46

02:00:49

02:00:52

02:00:56

02:00:59

02:01:02

16 Q. Did you ever discuss your diagnosis of borderline  
17 personality disorder with any of the family members when you  
18 had their interviews?

02:01:04

02:01:08

02:01:11

19 A. No.

02:01:11

20 Q. Did any of them bring that up to you, oh, I think  
21 Von, my brother, suffers from borderline personality disorder?

02:01:12

02:01:14

22 A. No, they didn't mention anything relating to a  
23 mental disorder or to addiction for that matter.

02:01:18

02:01:20

24 Q. I believe Mr. Eichel asked you about would it  
25 surprise you if the family testified that in 1984, they

02:01:23

02:01:28

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1 testified that they had a close and caring family, is that how 02:01:33  
2 they portrayed themselves when you interviewed them? 02:01:36

3 A. Yes. 02:01:39

4 Q. Would it surprise you that -- strike that. What 02:01:40  
5 was their definition of close? 02:01:46

6 A. Well, I mean, again, it was sort of interesting, 02:01:48  
7 because I remember particularly talking with the stepfather 02:01:51  
8 asking him if he felt that he and Von had developed a close 02:01:54  
9 relationship and he said, oh, yes. I said, well, tell me 02:01:58  
10 about that. And he said, well, there were a couple of times 02:02:00  
11 we went fishing. And I said, well, that is really neat, tell 02:02:03  
12 me about that. And he goes, well, we went out. And I said, 02:02:05  
13 well, what did you do? Well, I stood on the bank fishing and 02:02:08  
14 he stood on the bank fishing. I said, well, did you talk or 02:02:11  
15 spend any time together? He goes, well, no, just about, you 02:02:13  
16 know, the ones that got away, that kind of thing. And then he 02:02:16  
17 said that Von very rarely shared anything personal. That 02:02:20  
18 wasn't the type of relationship that they had. 02:02:24

19 Q. Can you explain in terms of your diagnosis of 02:02:26  
20 borderline, why Von Clark Davis would make up the outlandish 02:02:31  
21 story of Silkey Carr in 1983 and persist with it in 1984 at 02:02:37  
22 trial? 02:02:42

23 A. Borderlines do all kinds of really 02:02:42  
24 self-destructive things and self-defeating things. Probably 02:02:47  
25 the best example would be a psychiatric unit. I have worked 02:02:52

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1 with the hospital for a number of years and now have 02:02:55  
2 consulting relationships with several hospitals. Borderline 02:02:59  
3 comes on to an inpatient psychiatric unit. They are very, 02:03:01  
4 very disruptive, again because they are impulsive. They have 02:03:05  
5 mood swings. They are -- they have problems. And the thing 02:03:08  
6 becomes is, they will make up stories to cover what they are 02:03:12  
7 doing. And that is not unusual for them to do that. It is 02:03:17  
8 not unusual for them to hold to that story for a period of 02:03:22  
9 time. What is different is oftentimes if you confront them 02:03:24  
10 with very, very clear facts and clear consequences that they 02:03:30  
11 will then at that point sort of come clean with what the truth 02:03:33  
12 is. 02:03:37

13 Q. Okay. Mr. Eichel also asked you about his denial 02:03:38  
14 of alcohol and drug usage to Dr. Fisher after the verdict, but 02:03:42  
15 before the mitigation phase of that case. Is it unusual for 02:03:46  
16 someone with borderline to deny the use of alcohol? 02:03:50

17 A. It's not unusual for borderlines, but it is also 02:03:53  
18 not unusual for alcohol and drug abusers to minimize their 02:03:56  
19 use, particularly if they think it is going to get them in 02:04:01  
20 trouble. They may not disclose, or maybe, you know, again 02:04:03  
21 minimize the extent of their use. 02:04:06

22 Q. Okay. The use of alcohol in prison would be not a 02:04:08  
23 good thing; is that correct? 02:04:13

24 A. That's correct. 02:04:14

25 Q. Did you -- you talked about it in regards to use 02:04:15

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1 of alcohol in prison in your direct testimony. Did you mean 02:04:23  
2 while he was on death row? 02:04:28

3 A. No. This would be while he was incarcerated with 02:04:29  
4 the offense of Ernestine. 02:04:34

5 MS. COOK-REICH: I have no further questions. 02:04:43

6 JUDGE NASTOFF: Any recross? 02:04:44

7 MR. EICHEL: No, Your Honor. 02:04:47

8 JUDGE NASTOFF: All right. Any reason why Dr. 02:04:48  
9 Smith cannot be released permanently from his subpoena 02:04:50  
10 at this point? 02:04:53

11 MS. COOK-REICH: We would like to hold him in the 02:04:56  
12 event that there is additional testimony, Your Honor. 02:04:58

13 JUDGE NASTOFF: Fair enough. Doctor, your 02:05:00  
14 testimony is complete for the time being, but there may 02:05:01  
15 be cause for you to be recalled, so you are not 02:05:04  
16 released from your subpoena at this time. However, you 02:05:07  
17 are excused, check with the party that subpoenaed you 02:05:10  
18 before you leave the area, please. 02:05:11

19 THE WITNESS: Okay. 02:05:11

20 JUDGE NASTOFF: Thank you. All right. Any 02:05:13  
21 further evidence or testimony that you wish to present 02:05:38  
22 on behalf of Mr. Davis? 02:05:41

23 MR. PORTER: Your Honor, at this point we believe 02:05:43  
24 we have no testimony, but we would like to move for 02:05:46  
25 admission of exhibits first. 02:05:51

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1 JUDGE NASTOFF: Sure. And I do believe we have 02:05:53  
2 under advisement the statements of Elizabeth Crawford, 02:05:54  
3 Charles Flowers, Milton Flowers, and Fannie Whiteside; 02:06:01  
4 is that correct? 02:06:05

5 MS. COOK-REICH: We will withdraw those, Your 02:06:05  
6 Honor. 02:06:07

7 THE COURT: You are withdrawing those? 02:06:07

8 MS. COOK-REICH: Yes. 02:06:08

9 JUDGE NASTOFF: Fair enough. All right. What 02:06:09  
10 exhibits -- are these exhibits from your exhibit list 02:06:11  
11 that was provided to the Court earlier? 02:06:13

12 MR. PORTER: They are, correct, Your Honor. We 02:06:14  
13 are going to be substituting one of the exhibits 02:06:16  
14 because we have an update from -- or actually it's a 02:06:18  
15 back date from the Ohio Department of Corrections, but 02:06:21  
16 we would be moving the Court for admission of three 02:06:23  
17 exhibits. I assume it would help the Court if we did 02:06:25  
18 them individually. 02:06:29

19 JUDGE NASTOFF: Sure, just identify them, please. 02:06:29

20 MR. PORTER: The first one would be Exhibit J, 02:06:32  
21 Your Honor, which was the Institutional Summary Report. 02:06:34  
22 It was identified by Mr. Nowack today, that he 02:06:38  
23 completed it and that it is accurate. 02:06:43

24 JUDGE NASTOFF: All right. Any objection? 02:06:46

25 MR. OSTER: No, Your Honor. 02:06:48

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1 JUDGE NASTOFF: J will be admitted. 02:06:49

2 MR. PORTER: The next is what is marked K in the 02:06:51  
3 notebook. I gave the prosecution a revised version, if 02:06:54  
4 that would be correct, and with the Court's permission 02:07:01  
5 would be approaching the Court for permission to give 02:07:03  
6 them a revised Exhibit J and at that point giving -- K 02:07:06  
7 rather, and giving the Court an explanation with the 02:07:11  
8 Court's permission to approach. 02:07:14

9 JUDGE NASTOFF: Sure, you can certainly 02:07:16  
10 substitute. Do you have three copies of it? 02:07:18

11 MR. PORTER: I do, Your Honor. I have been 02:07:27  
12 passing them to you and you have been passing them to 02:07:28  
13 your colleagues. 02:07:32

14 JUDGE NASTOFF: So this will now be Exhibit K? 02:07:38

15 MR. PORTER: That would be correct. And first and 02:07:40  
16 slightly different, so let me deal with the difference 02:07:47  
17 in the exhibit first and then argue its admissibility. 02:07:50  
18 K, as the Court has in its notebook, is for a different 02:07:55  
19 date. The K that we proffered to the Court a minute 02:08:01  
20 ago is dated as of 7/8/04, the original one in the 02:08:09  
21 Court's notebook, the original one provided to the 02:08:15  
22 prosecution is 5/04/29. First if I could explain to 02:08:19  
23 the Court, both documents were provided to us by Ohio 02:08:25  
24 Department of Rehabilitation and Correction. The first 02:08:32  
25 document was provided prior to when this was originally 02:08:36

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1 scheduled for trial in May. We did not have a 02:08:40  
2 certification which the Court now has with respect to 02:08:46  
3 the revised certification. There was a problem with 02:08:49  
4 the Ohio Department of Rehabilitation and Correction. 02:08:53  
5 I was not the one that communicated with them this week 02:08:55  
6 on finding the original document they provided us. 02:08:58  
7 That is the reason for the substitution. 02:09:02

8 I believe the Court has already heard argument, K 02:09:04  
9 itself goes to the cost issue that has already been 02:09:09  
10 argued before the Court. And would just rely upon the 02:09:13  
11 argument that we have already made with respect to the 02:09:19  
12 cost issue that was made with respect to Mr. Nowack's 02:09:22  
13 testimony, Your Honor. 02:09:26

14 JUDGE NASTOFF: All right. State wish to be 02:09:27  
15 heard? 02:09:28

16 MR. OSTER: Your Honor, again, we would object to 02:09:28  
17 the cost estimate. The purpose here is to show and to 02:09:32  
18 look at things especially under the (B)(7) section of 02:09:37  
19 things that bear on a defendant's character, prior 02:09:41  
20 record, circumstances of the offense, anything that can 02:09:44  
21 mitigate. The cost of an inmate per day, the cost of 02:09:46  
22 the yearly inmate cost does not bear upon even the 02:09:52  
23 latitude that is found in a catchall factor of (B)(7). 02:09:59  
24 And we believe that to still be similar to statistics 02:10:03  
25 which have been kept out properly in these cases, and I 02:10:06

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1 don't believe that it is a characteristic of this 02:10:09  
2 individual or something the Court should consider so we 02:10:13  
3 will renew our objection for those reasons. 02:10:17

4 JUDGE NASTOFF: All right. One distinction that 02:10:19  
5 comes to mind, I know when the cases where there has 02:10:23  
6 been statistical evidence that has been offered, it has 02:10:25  
7 been offered with the intent that or the belief that 02:10:30  
8 the trial court should engage in proportionality 02:10:34  
9 analysis, in past cases that's why it has been offered 02:10:38  
10 and I know there is case law that expressly reserves 02:10:43  
11 that function for the appellate courts in Ohio and 02:10:45  
12 subsequent courts; that it is not a trial function. It 02:10:48  
13 is an appellate function. Are you aware of any cases 02:10:51  
14 that specifically -- I understand the nature of your 02:10:53  
15 argument with regard to cost, but are there any cases 02:10:57  
16 that specifically address this? 02:11:01

17 MR. OSTER: Your Honor, there is one case, 02:11:03  
18 however, you know, I shouldn't say in full disclosure 02:11:04  
19 because it's going to be obvious, but it is not an Ohio 02:11:06  
20 case. In looking at the I believe it is *Warner v.* 02:11:09  
21 *State*, 144 P 3d 838, 2006 case, they looked through a 02:11:15  
22 bunch of different things and in paragraph 163, their 02:11:24  
23 exact line is evidence of the cost effectiveness of the 02:11:28  
24 death sentence does not bear upon a defendant's 02:11:37  
25 character, prior record or the circumstances of the 02:11:39

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1 offense.

02:11:42

2 This issue, I did not find a lot of case law on,  
3 especially obviously in Ohio, I did not find really any  
4 on it. This was the most on point that I could find  
5 where a Court had a similar evaluation of a prior  
6 record, the character and individual circumstances of  
7 it, so in talking about case law I cannot cite anything  
8 from the State of Ohio. That is the closest I can find  
9 and present to this Court in support of that argument.

02:11:42

02:11:47

02:11:49

02:11:54

02:11:58

02:12:02

02:12:05

02:12:08

10 JUDGE NASTOFF: Thank you, Mr. Oster.

02:12:11

11 MR. PORTER: If I could respond very briefly.  
12 First is (B)(7) factor is not limited to character  
13 evidence. It is any other factors that are relevant to  
14 the issue to whether the offender should be sentenced  
15 to death. It has been a long time since I did a  
16 non-capital case. It's my recollection at least in  
17 non-capital cases the Court is at least required to  
18 give consideration to economics and my recollection  
19 could be wrong, if it is, it is.

02:12:13

02:12:17

02:12:21

02:12:25

02:12:28

02:12:32

02:12:36

02:12:41

02:12:47

20 JUDGE NASTOFF: Under Senate Bill 2 you're saying  
21 in non-capital cases?

02:12:49

02:12:52

22 MR. PORTER: Yes. And there is some focus now on  
23 putting offenders in least restrictive environments.  
24 We believe nothing else, it goes to that factor.

02:12:54

02:12:58

02:13:02

25 JUDGE NASTOFF: All right.

02:13:05

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1 (Judges confer off the record.) 02:13:11

2 MR. OSTER: Your Honor, I apologize to interrupt, 02:16:04  
3 but in discussing with co-counsel while in a lot of 02:16:08  
4 other cases maybe we would continue our objection, 02:16:10  
5 giving the unusual posture of this case, I will 02:16:12  
6 withdraw the objection and I apologize to the Court for 02:16:16  
7 going through it, but in evaluation with the, I believe 02:16:23  
8 the word uniqueness has been used before, I will 02:16:26  
9 withdraw the objection on behalf of the State. 02:16:30

10 JUDGE NASTOFF: Objection withdrawn, K admitted. 02:16:32

11 MR. PORTER: At this point we would move for one 02:16:36  
12 final exhibit, which is Exhibit L, Your Honor, which is 02:16:39  
13 the resume of Dr. Smith, which I believe he identified 02:16:41  
14 while he was testifying. 02:16:44

15 JUDGE NASTOFF: Any objection? 02:16:45

16 MR. OSTER: No, Your Honor. 02:16:49

17 JUDGE NASTOFF: L will be admitted without 02:16:53  
18 objection. 02:16:55

19 MR. PORTER: At this point, we would rest, Your 02:16:57  
20 Honor. With one additional housekeeping matter if I 02:17:00  
21 could ask Court about it. I just do not know its 02:17:04  
22 procedure. There was some, at least some argument 02:17:09  
23 previously with respect to Exhibits B through, at least 02:17:11  
24 they were referenced in a pleading if nothing else, B 02:17:15  
25 through I, I don't know the Court wants those kept 02:17:19

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1 separately for purposes of any appeal in this matter. 02:17:22

2 JUDGE NASTOFF: Well, they were included in your 02:17:26  
3 notebook, but I don't know that they were -- any of 02:17:29  
4 them were ever identified by any witness that testified 02:17:31  
5 during the hearing, were they? 02:17:33

6 MR. PORTER: I believe they were not, Your Honor. 02:17:35  
7 I just didn't know if the Court wanted for purposes of 02:17:38  
8 completeness of the record. 02:17:40

9 JUDGE NASTOFF: Well, I don't see a problem with 02:17:42  
10 having them preserved, I assume. I think typically, 02:17:44  
11 you know, obviously, things that are admitted into 02:17:49  
12 evidence need to be preserved and items that were 02:17:52  
13 identified as an exhibit, and even if not admitted need 02:17:56  
14 to be preserved, I don't know if other things that were 02:17:59  
15 thought about need to be but I don't see the harm in 02:18:02  
16 preserving it. 02:18:04

17 MR. PORTER: And it makes no difference to the 02:18:06  
18 defense I just wanted -- 02:18:07

19 JUDGE NASTOFF: I would recommend that those be 02:18:08  
20 taken out of our notebooks and we can allow you to do 02:18:10  
21 that so that when we retire to deliberate at the 02:18:13  
22 appropriate time, those items are not before us. 02:18:16

23 MR. PORTER: Okay. Thank you, Your Honor. 02:18:19

24 JUDGE NASTOFF: Anyone disagree? 02:18:21

25 JUDGE SPAETH: No, but I just wanted to make 02:18:22

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1 certain that the record is clear that these exhibits, 02:18:24  
2 is it A through J that we're referring to now? 02:18:28

3 JUDGE NASTOFF: A through I. 02:18:30

4 JUDGE SPAETH: A through I have never been 02:18:32  
5 identified by a witness, have never been moved into 02:18:34  
6 evidence, and this Court has never taken any action to 02:18:37  
7 impede the defendant from attempting to identify, 02:18:43  
8 introduce these exhibits. I just want to make certain 02:18:49  
9 that we are clear that this Court has not made a ruling 02:18:55  
10 that would have, that in any way negatively impacted on 02:18:57  
11 of the defendant's ability to admit A through I, and I 02:19:01  
12 want to make certain I wasn't misinterpreting your 02:19:06  
13 request to preserve these for the record. It almost 02:19:11  
14 implied that you are preserving your objection to a 02:19:14  
15 Court's ruling or perceived ruling with respect to 02:19:17  
16 Exhibits A through I. 02:19:20

17 MR. PORTER: First, is Exhibit A was never 02:19:22  
18 mentioned. And we aren't asking for the Court to put 02:19:24  
19 that in the record. My only request, and I was just 02:19:27  
20 looking for the court's guidance, having done a number 02:19:32  
21 of the direct appeals in these cases, and the direct 02:19:35  
22 appeal counsel has -- isn't here sometimes you sort of 02:19:40  
23 wonder what the heck was it counsel was doing, it is 02:19:44  
24 nice if they are there, if the Court doesn't want them 02:19:50  
25 there, that is fine, too. 02:19:51

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1 JUDGE NASTOFF: That's fine. What we want and I 02:19:53  
2 believe what Judge Spaeth's comments were directed 02:19:55  
3 towards, I think it was very clear, is simply that this 02:19:58  
4 is a decision that you are making as attorneys for Mr. 02:20:00  
5 Davis, with consultation with Mr. Davis not to offer 02:20:05  
6 these exhibits. It is not that you have been 02:20:10  
7 prohibited by the Court from introducing -- 02:20:13

8 MR. PORTER: And I never meant to suggest that. 02:20:15

9 JUDGE NASTOFF: And we are all in agreement that 02:20:17  
10 that is the case, correct? 02:20:18

11 JUDGE PATER: Just to put it more bluntly, is 02:20:20  
12 defense conceding that it has no -- and it never has 02:20:23  
13 had and does not have now any interest in identifying 02:20:27  
14 or admitting Exhibits A through I? 02:20:31

15 MR. PORTER: No. I think that was clear when we 02:20:35  
16 said we withdrew the exhibits. 02:20:37

17 JUDGE PATER: Thank you. 02:20:40

18 JUDGE NASTOFF: All right. Now that we cleared 02:20:42  
19 that up, is there anything further that the defense 02:20:43  
20 wishes to offer on behalf of Mr. Davis? 02:20:48

21 MR. PORTER: The defense rests. 02:20:52

22 JUDGE NASTOFF: All right. Does the State have 02:20:54  
23 rebuttal? 02:20:58

24 MR. OSTER: Your Honor, based upon what has 02:21:04  
25 occurred during the defense's case, especially with the 02:21:11

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1 members of the defendant's family being asked the 02:21:15  
2 specific question, I believe to all of them, is he 02:21:19  
3 meaningful to you, in talking about the impact on their 02:21:22  
4 lives, the United States Supreme Court case of *Payne* 02:21:26  
5 *vs. Tennessee*, states that the victim, surviving 02:21:29  
6 victim's family member would have an opportunity during 02:21:36  
7 a sentencing phase to be able to say the meaningfulness 02:21:38  
8 or what they have lost from their lives by the victim 02:21:44  
9 not being here, that has been followed in the State of 02:21:47  
10 Ohio, *State v. Fautenberry*. F-A-U-T-E-N-B-E-R-R-Y, 02:21:50  
11 1995 case, 72, Ohio State 3d., 435, as well as *State v.* 02:21:56  
12 *McNeill*, M-C-N-E-I-L-L, 1998 case, Ohio State 3d, 438, 02:22:04  
13 I think importantly in *McNeill*, the victim impact 02:22:13  
14 testimony by a murder victim's son during a penalty 02:22:18  
15 phase of a capital murder trial indicating that the 02:22:21  
16 defendant had brought sadness to the victim's son was 02:22:23  
17 admissible pursuant to Ohio Revised Code 2929.03 02:22:27  
18 (D)(2), to rebut mitigating testimony that the 02:22:33  
19 defendant had brought much joy to others and that is 02:22:36  
20 what the Court held in *State v. McNeill*. 02:22:39

21 We would want to offer Consia Butler, who is not 02:22:41  
22 -- in *McNeill* the difference would be this is the 02:22:49  
23 daughter, not the son -- to simply answer one question 02:22:50  
24 which would be and could be phrased very openly and we 02:22:54  
25 wouldn't ask to go into too much other than just the 02:23:01

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1 impact of not having her mother has had upon her. And 02:23:08  
2 that -- 02:23:14

3 JUDGE SPAETH: How does that rebut the State's 02:23:15  
4 point -- 02:23:18

5 JUDGE NASTOFF: The defendant's. 02:23:18

6 JUDGE SPAETH: I'm sorry, the defendant's point 02:23:20  
7 that to lose through execution of the defendant, would 02:23:24  
8 be a loss to the various witnesses? In other words, 02:23:29  
9 you have the right to rebut, but this doesn't sound 02:23:34  
10 like it is rebuttal nor does it on its face sound like 02:23:37  
11 it goes to the aggravating factor at issue in this 02:23:42  
12 case. 02:23:46

13 MR. OSTER: Your Honor, I think that a reading of 02:23:46  
14 the United States Supreme Court case of Tennessee vs. 02:23:48  
15 Payne says that this is, first of all admissible, to 02:23:50  
16 the purpose of putting a face on the victim, and there 02:23:53  
17 is no 8th Amendment bar to that. It is not necessarily 02:23:57  
18 an aggravating circumstance and it will not be 02:24:01  
19 considered and we would agree it should not be 02:24:04  
20 considered as an aggravating circumstance in this case 02:24:07  
21 only, the (A)(5) factor is, but both United States 02:24:09  
22 Supreme Court and the Ohio Supreme Court have been very 02:24:12  
23 clear that this can be presented and used in this 02:24:15  
24 manner. 02:24:19

25 what they have been clear about is that the 02:24:19

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1	victim's surviving relative can make no mention about	02:24:21
2	what sentence to impose or anything else, which is why	02:24:25
3	the State would say we would want to ask one simple	02:24:28
4	question about the impact to be had. And if you look	02:24:32
5	at the McNeill case, specifically I think very much	02:24:35
6	they say to rebut mitigation testimony that the	02:24:39
7	defendant had brought much joy to others, in this case,	02:24:43
8	we had a mother, a father, I'm sorry, a mother, a	02:24:45
9	stepfather, a brother, a daughter, a sister, a pen pal	02:24:51
10	who have all discussed their relationship, the good	02:24:57
11	parts of it, the joy that Mr. Davis has brought to	02:25:01
12	them, and the reason that the United States Supreme	02:25:03
13	Court decided <u>Tennessee vs. Payne</u> and overruled the	02:25:06
14	Booth case, which it previously kept this type of	02:25:09
15	material out, is because they thought that the	02:25:14
16	character and the emotional impact of the murder on the	02:25:17
17	victim's family should not be precluded in a sentencing	02:25:21
18	hearing. And while it may not in every case come up, I	02:25:24
19	think that in this case especially, due to the fact	02:25:29
20	that we have heard from so many of those witnesses	02:25:31
21	about the impact Mr. Davis has had on their life, and	02:25:34
22	especially looking at the Fautenberry case, and McNeill	02:25:38
23	case, I think that it is appropriate to allow Ms.	02:25:42
24	Butler who was on our witness list to be able to answer	02:25:48
25	and very frankly with the Court to answer one question.	02:25:52

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1 I expect not to ask her anything else. I have copies  
2 of the relevant cases if Your Honors would like to look  
3 at it but we would make that request as a piece of  
4 rebuttal evidence.

5 JUDGE NASTOFF: All right. One thing I will  
6 indicate is first of all Payne vs. Tennessee is not a  
7 new case. I mean it is a 1991 case. It has been  
8 around for quite a while.

9 MR. OSTER: Correct, Your Honor.

10 JUDGE NASTOFF: And it has been a few months since  
11 I've read it, but my recollection of Payne vs.  
12 Tennessee spoke more to the statutory scheme adopted by  
13 a particular state for addressing capital murder cases.  
14 And if my recollection is that what Payne says is that  
15 if a state chooses to permit victim impact evidence as  
16 a part of its statutory scheme, that the 8th amendment  
17 doesn't erect a per se bar to that. I don't think that  
18 it addresses in an individual case specifically that  
19 victim impact evidence, particularly in Ohio, is or is  
20 not admissible.

21 I think what the fall out of Payne in my  
22 understanding is after Payne, if a state wishes to set  
23 up a statutory scheme whereby victim impact evidence  
24 could be considered, and argued, that the 8th Amendment  
25 doesn't bar that. What I can tell you is that I could

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1 cite to at least one, two, three, four, five, six,  
2 seven, eight, double digits certainly more than ten,  
3 Ohio Supreme Court cases since Payne that have  
4 addressed the issue of whether victim impact evidence  
5 that was heard in a case was reversible error.  
6 Sometimes it is, sometimes it isn't. So but that is my  
7 understanding of where it is. It is always an issue.

8 MR. OSTER: I fully agree, Your Honor, but in my  
9 research those cases where it has been an issue is  
10 where the person gets up and testifies as to what  
11 sentence they believe that the defendant should receive  
12 and it is reversible error for that person to say what  
13 sentence, be it death, life in this case, life with  
14 thirty, what sentence that would be reversible error.  
15 We do not intend, we are well aware of that with, would  
16 be happy for the Court giving instruction to the  
17 witness before testifying that they are in no way to  
18 ever state that, which is why the State would ask  
19 simply for one question and we believe that with the  
20 Ohio Supreme Court looking at 2929.03 (D)(2), in the  
21 McNeill case, however in this case it would be (D)(3) I  
22 believe (D)(2) deals with juries, (D)(3) would deal  
23 with a three-judge panel. The Ohio Supreme Court has  
24 taken Payne, has taken an Ohio statute, and if the  
25 procedure is done properly has found that it is

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1       admissible, and especially McNeill is admissible as  
2       rebuttal evidence.

3               That would be our simple request, Your Honor, and  
4       I understand it may not be a simple legal issue but  
5       that would be our request is to ask that one question  
6       pursuant to those cases and that statute.

7               JUDGE NASTOFF: Fair enough.

8               MR. PORTER: Number of issues, first I believe  
9       Judge Nastoff is correct, Payne only deals with the 8th  
10      Amendment issue not statutory issue. Secondly, is  
11      agreeing with Judge Spaeth on this issue is I am unsure  
12      what it rebuts. I thought the testimony in this case  
13      was from several family members that they understood  
14      that Von had caused great harm to the family, and I  
15      thought he mentioned that repeatedly in his statement.  
16      So again, I don't know what that rebuts. And third is,  
17      I think Ohio has changed the statute since Payne and I  
18      am unsure on this, so I put an unsure out there when I  
19      make this argument is having made it recently in a  
20      non-capital case, and that there was, at the time of  
21      Mr. Davis' sentencing in '84 I'm not too sure there was  
22      any statutory authority for the Court to permit any  
23      victim impact statement.

24              JUDGE NASTOFF: All right. Judges, if you want  
25      to...

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1 (Judges confer off the record.) 02:30:36

2 JUDGE NASTOFF: All right. The three judges have 02:32:07  
3 discussed the issue, and it is the -- our opinion that 02:32:09  
4 it is not appropriate rebuttal evidence in this case 02:32:15  
5 and we are not going to allow the State to proceed with 02:32:19  
6 that. Is there any other rebuttal evidence that you 02:32:22  
7 would wish to offer? 02:32:25

8 MR. EICHEL: Your Honor, please, I would move in 02:32:28  
9 light of the doctor's testimony bringing out a factor 02:32:30  
10 in mitigation dealing with the conduct of the defendant 02:32:39  
11 on the night in question. I think it has value as 02:32:41  
12 mitigating evidence can only be considered in light of 02:32:46  
13 part of the trial testimony in this case. So I would 02:32:51  
14 move for the admission at this time, the readmission of 02:32:55  
15 trial testimony of Reginald Denmark, Hosette Massie, 02:33:00  
16 Mona Aldridge, Wade Coleman, and Mark Lovette. These 02:33:06  
17 are witnesses who observed the defendant's conduct on 02:33:20  
18 the night in question. 02:33:23

19 Dr. Smith's testimony goes to the defendant's 02:33:25  
20 conduct on the night in question whether it has 02:33:28  
21 mitigating value. State vs. Stump, the lead case, the 02:33:32  
22 original case that has been reaffirmed many times, this 02:33:36  
23 Court cannot consider the case in a vacuum. 02:33:40

24 JUDGE NASTOFF: well, we have already ruled on 02:33:46  
25 having reviewed the transcript prior to coming in here, 02:33:49

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1 number one, so that we are not considering the case in 02:33:51  
2 a factual vacuum, number two so that we would be in a 02:33:55  
3 position to be able to rule on offers of evidence so we 02:33:58  
4 would understand if you are offering a certain witness' 02:34:03  
5 testimony so we would know who in the world we were 02:34:06  
6 talking about, and third, because we believe that we 02:34:09  
7 have a separate independent statutory duty to review 02:34:12  
8 the trial phase evidence to determine whether there was 02:34:18  
9 anything mitigating about the nature and circumstance 02:34:23  
10 of the offense. So we have done that. 02:34:26

11 Now, you are saying that you want to offer those 02:34:29  
12 portions of testimony into evidence to rebut Dr. Smith; 02:34:32  
13 is that correct? 02:34:36

14 MR. EICHEL: It's not in rebuttal to Dr. Smith. 02:34:38  
15 It is to allow the Court to consider it as under 02:34:39  
16 statute the Court is entitled to consider, nature and 02:34:43  
17 circumstances in relation to whether there is 02:34:46  
18 mitigating evidence in it. The doctor has testified 02:34:50  
19 the defendant's conduct has some mitigating value. The 02:34:53  
20 Court can only consider whether it has mitigating value 02:34:58  
21 in relation to the nature and circumstances of the 02:35:01  
22 offense committed. 02:35:04

23 JUDGE NASTOFF: Well, and again, I will seek some 02:35:05  
24 input here in a moment, but we have already reviewed 02:35:07  
25 the transcript to determine whether -- or so that we 02:35:12

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1 can weigh whether there is anything mitigating arising 02:35:15  
2 out of the nature and circumstances of the offense. 02:35:20  
3 So, I mean, that is a continuing duty that we would 02:35:22  
4 have until we retire to deliberate and we would 02:35:25  
5 certainly consider that in light of the testimony 02:35:28  
6 presented by Dr. Smith, but I don't know that, for 02:35:31  
7 example, everything that Dr. Smith relied upon in his 02:35:35  
8 testimony would then become something that has to be 02:35:39  
9 admitted into evidence separately for us to consider. 02:35:42

10 MR. EICHEL: Okay. With that clarification, Your 02:35:46  
11 Honor, I understand the Court's ruling. The Court is 02:35:48  
12 considering for it's mitigating -- to give the Court an 02:35:52  
13 ability to assess the mitigating value of the evidence, 02:35:58  
14 so if I understand correctly then I will withdraw the 02:36:03  
15 offer. 02:36:06

16 JUDGE NASTOFF: All right. And do you wish to be 02:36:07  
17 heard on the matter? I mean, I understand you disagree 02:36:09  
18 with the pretrial ruling regarding reviewing the 02:36:13  
19 transcript. I have made that ruling prior to us 02:36:16  
20 impaneling the three-judge panel separate and apart 02:36:20  
21 from that objection, is there anything else to be -- 02:36:23

22 MR. PORTER: Other than renewing our prior 02:36:27  
23 objection, no, we have nothing else to say, thank you, 02:36:29  
24 Your Honor, for asking. 02:36:31

25 JUDGE NASTOFF: All right. All right. Anything 02:36:32

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1 else from the State? 02:36:34

2 MR. EICHEL: No, Your Honor, I apologize for my 02:36:35  
3 lack of clarity on the issue. 02:36:37

4 JUDGE NASTOFF: Not at all. All right. So there 02:36:40  
5 is no rebuttal other than what we have discussed? 02:36:44

6 MR. EICHEL: No, Your Honor. 02:36:47

7 JUDGE NASTOFF: The evidence in the case is 02:36:48  
8 closed then at this point in time? 02:36:49

9 MS. COOK-REICH: Yes, Your Honor. 02:36:51

10 JUDGE NASTOFF: One thing, two things that I want 02:36:52  
11 to address, number one, do you need a few moments to 02:36:56  
12 collect your thoughts for closing? 02:36:59

13 MS. COOK-REICH: Just a few. 02:37:00

14 JUDGE NASTOFF: Okay. And then number two, I know 02:37:01  
15 that Mr. Davis has a separate right of allocution under 02:37:06  
16 the Criminal Rules that has to be addressed. And I 02:37:11  
17 know I have seen it raised at different times in 02:37:17  
18 different cases, but it appears to me that to ask after 02:37:20  
19 we have completed our deliberations on the case, and we 02:37:25  
20 come back out to ask for it at that point in time, 02:37:29  
21 would seem to have little utility or purpose since we 02:37:32  
22 would be coming out ostensibly with a decision on the 02:37:37  
23 case, so what I would ask is, I mean if you think it is 02:37:42  
24 more appropriate that we inquire at that time, we can, 02:37:46  
25 but I think that it would be more appropriate to 02:37:49

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1	inquire whether he wishes to exercise any allocution	02:37:51
2	rights prior to us engaging in deliberations.	02:37:54
3	MR. PORTER: Mr. Davis does not wish to make	02:38:05
4	another statement, Your Honors.	02:38:08
5	JUDGE NASTOFF: So you would waive any further	02:38:10
6	allocution?	02:38:13
7	THE DEFENDANT: Yes.	02:38:15
8	MR. PORTER: Yes.	02:38:16
9	JUDGE NASTOFF: All right. With that, then State	02:38:17
10	ten minutes, longer than that, shorter than that?	02:38:21
11	JUDGE PATER: One thing we should do in the	02:38:27
12	interim, we should give our notebooks, I think, back to	02:38:29
13	the defense counsel and then defense counsel will just	02:38:31
14	maybe insert the new K and leave the other two that are	02:38:34
15	being admitted and then delete everything else, that	02:38:37
16	would be great.	02:38:41
17	MR. OSTER: Can we ask for fifteen minutes?	02:38:45
18	JUDGE NASTOFF: Certainly. Why don't we call it	02:38:47
19	3:00, okay. So, we will reconvene at 3:00 for closing	02:38:51
20	argument. We will be in recess until that time and our	02:38:55
21	notebooks are up here.	02:38:58
22	(Recess taken the this time.)	02:39:03
23	JUDGE NASTOFF: We're back on record in State of	03:09:18
24	Ohio vs. Von Clark Davis, CR1983-12-0614. Record will	03:09:24
25	again reflect that Mr. Davis is present with his	03:09:27

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1 counsel, Randall Porter, Ms. Cook-Reich, State's  
2 representatives Dan Eichel and Michael Oster, assistant  
3 prosecutors are present, all three members of the  
4 three-judge panel are present. And the evidence in the  
5 case is closed. Defendant has waived allocution and I  
6 believe we are prepared to hear closing arguments at  
7 this time.

8 Since the State has the burden of proof, it's my  
9 understanding in these proceedings that the State  
10 proceeds first and last with the argument from the  
11 defense sandwiched between those. So are you ready to  
12 proceed with closing argument at this time?

13 MR. EICHEL: Yes, Your Honor.

14 JUDGE NASTOFF: Will you be addressing the Court,  
15 I assume?

16 MR. EICHEL: That's correct, yes.

17 JUDGE NASTOFF: All right. You may proceed.

18 MR. EICHEL: May it please this Honorable Court,  
19 Mr. Oster, Mr. Porter, Ms. Cook-Reich, Your Honors, I  
20 want to begin by thanking you for the kind and close  
21 attention that you have paid to the details of this  
22 case. We are asking under the facts of this case that  
23 you apply the law as it is written, and that you  
24 determine that the weighing process requires that the  
25 sentence of death be imposed on Von Clark Davis.

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1 I appreciate the difficulty, the awesome 03:10:56  
2 responsibility that a judge always undertakes in -- on 03:11:00  
3 a daily basis in applying the sentencing laws even in a 03:11:05  
4 regular non-capital case, other than capital felony 03:11:10  
5 cases the Court practices every day, and you apply the 03:11:16  
6 sentence that fits both the crime and the offender. It 03:11:23  
7 is really a lot of complicated rules, but it comes down 03:11:29  
8 to that simple. That is what the 8th Amendment 03:11:33  
9 requires here. 03:11:38

10 In this case, capital case. And when it is a 03:11:43  
11 panel of three judges in a capital case, I appreciate 03:11:47  
12 the fact that this difficulty, this responsibility to 03:11:51  
13 apply the law and find the facts more than triples. 03:11:56  
14 It's not mathematical. You don't assign it numbers and 03:12:02  
15 then count them up. It is a discretion that we see 03:12:07  
16 exercised on the bench that is beyond the ability of 03:12:11  
17 the words we say here today to add or detract. And 03:12:15  
18 that last thing being said, I ask myself, how do I 03:12:22  
19 argue this case for resentencing? I have to be guided 03:12:26  
20 by the statute in place, the statute under which we 03:12:33  
21 proceed. We all have to do that, taking no pleasure in 03:12:38  
22 it. We all have to do that. 03:12:42

23 In some respects I find myself thinking of you as 03:12:46  
24 I would a three-judge appellate court, Court of 03:12:49  
25 Appeals, falling in my mindset of an appellate 03:12:53

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1 prosecutor, which is what I have been for the last 12  
2 years personally, I don't set foot here on the third  
3 floor very often, do I? Here you are working on a case  
4 that you didn't try the trial, but are working on that  
5 case, but by the same token, I have to remind myself  
6 that in this sentencing hearing where the evidence is  
7 received firsthand by you, the penalty phase, it isn't  
8 the Court of Appeals level, you are the primary fact  
9 finders, you have the discretion to find the facts, to  
10 find out -- to find the fact as to what is credible,  
11 what is not credible. You don't have to accept  
12 testimony or other evidence simply because it was  
13 presented, you can find what is worthy of belief and  
14 what is not worthy of belief, but most importantly it  
15 is your call as to how much weight you give to any item  
16 or any factor at issue.

17 We are resentencing Von Clark Davis in a hearing  
18 before this three-judge panel which did not hear the  
19 trial in which he stands convicted of Count One of  
20 aggravated murder of Suzette Butler in violation of  
21 Revised Code 2903.08 on or about the 12th day of  
22 December 1983 and in Butler County, Ohio, Von Clark  
23 Davis did purposely and with prior calculation and  
24 design cause the death of Suzette Butler. And he also  
25 stands convicted of a single specification of

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1       aggravating circumstance 2929.04(A)(5) that prior to  
2       the aggravated murder of Suzette Butler the defendant  
3       had been convicted of one count of second degree murder  
4       in violation of former Revised Code 2901.05 for  
5       purposely causing the death of his wife.

6       The evidence at trial upon which the three-judge  
7       panel has found that the aggravating specification was  
8       proven beyond a reasonable doubt, was a stipulated  
9       judgment of conviction entry dated April 20, 1971, case  
10      number 21655, indicating that the defendant was  
11      previously convicted of murder in the second degree, in  
12      violation of Revised Code 2901.05 as then existed.

13      This aggravating circumstance you will weigh  
14      against the defense presented mitigating evidence,  
15      presented as to the defendant's history, character, and  
16      background, his unsworn statement and the other factors  
17      brought forward and argued as mitigating. Under the  
18      statute there is one and only one deciding question to  
19      be answered. Quoting Revised Code 2903, quote, if the  
20      panel of three judges unanimously find by proof beyond  
21      a reasonable doubt that the aggravating circumstance  
22      the offender was found guilty of committing outweighs  
23      the mitigating factors, it shall impose the sentence of  
24      death on the offender.

25      Absent such a finding by the panel the panel shall

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1 impose one of the following sentences on the offender, 03:16:32  
2 life imprisonment with parole eligibility after serving 03:16:36  
3 20 full years of imprisonment, or life imprisonment 03:16:40  
4 with parole eligible after serving 30 full years of 03:16:43  
5 imprisonment. I have to ask: How can anything 03:16:47  
6 mitigate a repeat convicted murderer, a killer who has 03:16:55  
7 purposely killed not once, but twice? What does it 03:17:01  
8 mean to outweigh? Here I have to be guided by a jury 03:17:09  
9 instruction defining that term as approved in *State vs.* 03:17:13  
10 *Sperco* in point citation page 3459 Ohio State 3d.1. 03:17:17

11 To outweigh means way more than to be more 03:17:23  
12 important than, and the standard instruction continues 03:17:28  
13 it is the quality of the evidence regarding the 03:17:33  
14 aggravating circumstance and mitigating factors that 03:17:36  
15 must be given primary consideration by you. The 03:17:40  
16 quality of the evidence may or may not be the same as 03:17:43  
17 the quantity of the evidence; that is, the number of 03:17:46  
18 witnesses or exhibits presented in this case. 03:17:49

19 Here, I am reminded of a mountain of vertical rock 03:17:54  
20 that juts out of the planes of Wyoming, it was formed 03:18:02  
21 by a volcanic process of lava flowing many millions of 03:18:06  
22 years ago, it is called Devil's Tower. It was declared 03:18:11  
23 a national monument over a hundred years ago, maybe you 03:18:16  
24 recall it from the Spielberg movie, it was the focus of 03:18:20  
25 the movie Close Encounters of the Third Kind about 03:18:24

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1 thirty years ago. It juts up almost out of nowhere  
2 towers over the landscape and as you drive on the  
3 roads, mostly flat rolling terrain, leaning forward you  
4 can see it for miles in the distance.

5 As you travel the rolling hills and creeks and  
6 farms and villages of prairie dogs it looms large,  
7 looms large over everything else. It is the most  
8 significant important thing there. Your Honors, there  
9 is a mountain, there is a rock in this courtroom. It  
10 is the most significant thing here. It is more  
11 important than anything else in this case. It is the  
12 most important thing in this defendant's life history,  
13 it is the only significant thing about him in relation  
14 to the sentencing criteria in this case. Nothing else  
15 is shown to be deserving very much weight. It  
16 outweighs everything else by proof beyond a reasonable  
17 doubt.

18 Von Clark Davis is convicted in April 1971  
19 purposely killing his wife, thereafter 13 years later,  
20 he purposely kills again, Suzette Butler. Not once,  
21 but twice, one after the other. When you weigh that,  
22 it outweighs all of the things that are considered by  
23 you as mitigating, all of the ideas set forth why he  
24 should be spared, forgiven, given a lesser penalty,  
25 they don't combine in their totality. All else is just

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1	rolling hills and valleys, creeks under the massive	03:20:22
2	mountain.	03:20:26
3	Dr. Smith, he tried to set forth a reason why this	03:20:29
4	defendant was at risk to do these crimes. When you	03:20:33
5	look at what he said, he more or less explains why this	03:20:37
6	man commits the crimes. That is what he said. This	03:20:42
7	explains and let's you understand it, but it doesn't	03:20:45
8	reduce blame. He's kind of telling you it is the road	03:20:50
9	leading to the mountain, doesn't outweigh the mountain.	03:20:55
10	MR. PORTER: Objection. He seems to be misstating	03:21:06
11	the law of a mitigation -- weigh aggravation --	03:21:08
12	MR. EICHEL: Let me --	03:21:11
13	JUDGE NASTOFF: Sustained.	03:21:11
14	MR. EICHEL: I agree, I should not have phrased it	03:21:12
15	that way. I got off of my page.	03:21:16
16	JUDGE NASTOFF: We're not going to consider that	03:21:19
17	argument, you can rephrase.	03:21:20
18	MR. EICHEL: I will leave it. It is kind of like	03:21:26
19	telling you the road that leads to the mountain and I	03:21:28
20	suggest to you Dr. Smith's opinion is based on	03:21:35
21	extrapolation something of an exaggeration of witness'	03:21:40
22	testimony that we heard from the people he said he	03:21:45
23	talked about with all of the social history, based on	03:21:47
24	what defendant told him, the defendant who keeps	03:21:52
25	telling different stories.	03:21:56

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1 And then there is yet another story about how he 03:22:01  
2 executed Suzette Butler in some kind of alcoholic fog, 03:22:05  
3 Jerry Stineman which didn't even make in it to Dr. 03:22:10  
4 Smith's opinion like we all expected but it didn't 03:22:16  
5 happen because he didn't even talk to him. That is not 03:22:20  
6 part of the social history that Dr. Smith -- where was 03:22:22  
7 that coming from? That is a third thing here in this 03:22:25  
8 case besides Silkey Carr and besides what he told Dr. 03:22:28  
9 Smith. How does the alcoholic fog, Jerry Stineman's 03:22:34  
10 testimony fit the eyewitness accounts of how the 03:22:42  
11 witnesses saw him that night? Or what he told Dr. 03:22:46  
12 Fisher way back when. Or what he stated at trial in 03:22:49  
13 the first phase. 03:22:53

14 Going back to Dr. Smith, if you accept it, Dr. 03:22:57  
15 Smith, his opinion may explain it but it does not 03:23:03  
16 justify or mitigate the aggravated murder that was 03:23:06  
17 horrible, callous, evil, unforgiveable, unmitigated. 03:23:09  
18 Dr. Smith said he was at risk to make a bad choice. 03:23:19  
19 Twice he made the bad choice. Twice. 03:23:26

20 When you decide this case I trust that your 03:23:36  
21 verdict should not be swayed or influenced by any 03:23:39  
22 consideration, sympathy, bias, prejudice. It is your 03:23:43  
23 duty to carefully weigh this evidence. Decide all 03:23:46  
24 disputed questions of fact, to apply the rule of law to 03:23:51  
25 your findings. To render your verdict accordingly. In 03:23:54

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1 fulfilling your duty your efforts will most certainly 03:23:59  
2 arrive at a just verdict. You will consider all of the 03:24:02  
3 evidence and make your finding with intelligence 03:24:07  
4 impartiality, without bias sympathy or prejudice, 03:24:11  
5 giving this defendant a fair trial. 03:24:14

6 In conclusion, may I say that the evidence has 03:24:19  
7 shown, the evidence to be considered by you under 03:24:21  
8 2929.03 has shown that the aggravating circumstance in 03:24:26  
9 this case outweighs the mitigating factors presented in 03:24:35  
10 this case by proof beyond a reasonable doubt and upon 03:25:02  
11 such finding, the sentence of death will be imposed, 03:25:02  
12 the facts and the law require it. Thank you. 03:25:02

13 JUDGE NASTOFF: Thank you, Mr. Eichel. Ms. 03:25:02  
14 Cook-Reich, are you going to be arguing for the 03:25:02  
15 defense? 03:25:02

16 MS. COOK-REICH: I am, Your Honor. 03:25:02

17 JUDGE NASTOFF: You may proceed when you are 03:25:02  
18 ready. 03:25:02

19 MS. COOK-REICH: Mr. Oster, Mr. Davis, Mr. Porter, 03:25:02  
20 Judges, I want to thank you for your patience and time 03:25:11  
21 in this unique case as we have phrased it many times. 03:25:15  
22 As you know, this case is about punishment, I am not 03:25:17  
23 going to lecture on the law because I am going to 03:25:20  
24 assume you know the law and you read and you are ready 03:25:22  
25 to prepare on this case. It is our contention 03:25:26

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1       aggravating proven in this case does not outweigh the       03:25:28  
2       mitigating factors presented by proof beyond a       03:25:31  
3       reasonable doubt.       03:25:33

4               The mitigating factors are not excuses, they are       03:25:35  
5       not reasons, they are not justifications. If those are       03:25:37  
6       what they were, I submit the law of Ohio wouldn't have       03:25:40  
7       them in there. Because there aren't reasons or       03:25:44  
8       justifications or excuses. That is not what this is       03:25:47  
9       about. We did not present Dr. Smith as an excuse. We       03:25:50  
10       presented him to explain and that is what he did. It       03:25:54  
11       was lengthy but he did give an explanation. He gave a       03:25:57  
12       complete social forensic history of everyone he spoke       03:26:02  
13       to, everyone he interviewed, all of the documents he       03:26:05  
14       reviewed. Every psychological evaluation that has ever       03:26:08  
15       been done of Von, he was complete and thorough in that.       03:26:12

16               In this case, it is about the three options, 20 to       03:26:16  
17       life, 30 to life, or death. 20 to life is not what we       03:26:20  
18       are asking you to impose. We are asking that you       03:26:24  
19       determine the proper sentence is 30 to life because in       03:26:28  
20       our opinion, and our belief that the evidence presented       03:26:31  
21       30 to life is in essence what LWOP is today, life       03:26:36  
22       without the possible of parole. And it is LWOP,       03:26:41  
23       because of his history, no parole board I submit to you       03:26:45  
24       is going to by majority vote release Von Clark Davis       03:26:48  
25       with his criminal history. And therefore, this is in       03:26:52

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1 essence 30 to life is death by natural causes in prison 03:26:57  
2 rather than death by legal injection. 03:27:01

3 Cynthia Mausser told you when Mr. Porter asked her 03:27:06  
4 questions specifically about it, he gave her the 03:27:10  
5 hypothetical fact scenario, for those hypotheticals, 03:27:13  
6 all except for the last one are exactly what sits 03:27:20  
7 before you. First conviction of killing his wife, 03:27:21  
8 second degree murder. Paroled after a decade. While 03:27:24  
9 on parole, he commits another murder by killing his 03:27:26  
10 girlfriend. He is convicted of aggravated murder with 03:27:30  
11 a capital specification. He gets a sentence of death 03:27:33  
12 imposed by three judges, but then after 25 years, he 03:27:36  
13 gets a new sentencing hearing. And this is where the 03:27:40  
14 hypothetical ended. It began with what we are asking 03:27:43  
15 you to do, to impose the 30 to life. That added to 03:27:47  
16 that hypothetical, Mr. Porter asked Ms. Mausser, in 03:27:51  
17 your experience, training and work on the parole board 03:27:56  
18 after all of these years, is it your opinion that a 03:27:59  
19 person, Von Clark Davis in this case, is ever going to 03:28:03  
20 be paroled, and her words and this is what I wrote down 03:28:07  
21 in my quotes, you take what you remember. This person 03:28:11  
22 is quote, likely to spend a large portion of his adult 03:28:14  
23 life in prison, and then he is unlikely to get parole 03:28:18  
24 at the first hearing. 03:28:22

25 we extrapolated for you when that first hearing 03:28:25

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1 would be which I believe is in six years with the 03:28:28  
2 consecutive sentence for the weapons under disability 03:28:32  
3 which is attached to this particular offense. She 03:28:35  
4 can't tell for a fact that Von Clark Davis will not get 03:28:39  
5 out. She can't tell you that. And the reasons for 03:28:42  
6 that are, one, it's against the law to judge that 03:28:45  
7 without all of the information, and Mr. Oster brought 03:28:48  
8 out the fact that she doesn't have the plethora of 03:28:50  
9 information a board would have before them. Secondly, 03:28:54  
10 she is one person of a majority of a board. 03:28:57

11 If in six years he had a parole board hearing a 03:29:05  
12 majority would have to decide this case. Assuming you 03:29:07  
13 are the parole board just like every day you do as a 03:29:13  
14 judge, sitting here for Judge Nastoff on this bench and 03:29:16  
15 the other judges on your own benches, you hear a 03:29:21  
16 defense attorney standing next to their client asking 03:29:24  
17 for probation. Judge, my client has changed his life, 03:29:26  
18 Judge, he has the family support, Judge, he has beaten 03:29:29  
19 his addiction, he has gone to AA, he has done 03:29:33  
20 everything he can. Just like that, that is what a 03:29:36  
21 parole board is going to have before them, but a 03:29:40  
22 majority decides that. 03:29:43

23 And the response to that in a parole board setting 03:29:44  
24 is the prosecutor is standing there saying no, way do I 03:29:48  
25 ever want this person out, I don't agree to probation. 03:29:51

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1 You have the PSI, which would tell you the client's 03:29:56  
2 complete criminal history; you have the victims and 03:30:00  
3 their families standing there, it is exactly what a 03:30:03  
4 parole board would have before them. It is just like 03:30:06  
5 every day when you sentence someone. So in the defense 03:30:09  
6 attorney stands here next to the two-time killer and 03:30:12  
7 says, Judge, he has had 25, 35, 45 years of good 03:30:16  
8 behavior, will you let him out now? You consider all 03:30:21  
9 of those factors, just as the parole board would. And 03:30:23  
10 you make that decision and you use your discretion. 03:30:27

11 Mr. Oster wanted to make the word discretion for 03:30:30  
12 the parole board seem like an evil or dirty word, but 03:30:33  
13 you use it every day in every one of your sentencing 03:30:37  
14 decisions, and I submit to you that just like when a 03:30:39  
15 defense attorney stands here and asks for you to give 03:30:42  
16 their client another chance, and in this case it would 03:30:45  
17 be parole for Mr. Davis. In that case it would be 03:30:49  
18 probation for Mr. Davis, you would say no way am I 03:30:52  
19 going to let him out on the streets. Just like the 03:30:55  
20 parole board is going to say that when they look at his 03:30:57  
21 history. 03:31:01

22 Life, 30 to life is life without the possibility 03:31:06  
23 of parole for von Clark Davis with his history. Mrs. 03:31:09  
24 Mausser gave you the matrix chart score information she 03:31:14  
25 provided. The offense score, she gave him a 13, which 03:31:19

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1 is the highest of that score he could get based upon 03:31:22  
2 his criminal history. She could not give us a criminal 03:31:25  
3 history risk score because there are many other things 03:31:28  
4 that go in it that she doesn't have available to her to 03:31:31  
5 make today or yesterday when she did testify. But she 03:31:35  
6 did say a couple of interesting things. 03:31:37

7 She said that while she has been on the board she 03:31:40  
8 has never seen an aggravated murder defendant come up 03:31:42  
9 for parole, let alone an aggravated murder with death 03:31:47  
10 specifications or capital specifications come before 03:31:53  
11 the parole board. So a person of that like has never 03:31:55  
12 even appeared before the parole board for parole. What 03:31:58  
13 are the chances that the first one that comes before 03:32:02  
14 them, von Clark Davis, that they are going to let that 03:32:03  
15 person out? With his criminal history, we know he has 03:32:06  
16 a 13 offense score, let alone what she said about the 03:32:10  
17 fact that they have a full hearing, the victim and the 03:32:15  
18 victim's family is present, the prosecutor is present, 03:32:19  
19 the police are present, or at least have the ability to 03:32:22  
20 be there. And they put it on their website to allow 03:32:25  
21 additional information as to why they should or should 03:32:29  
22 not let someone out. 03:32:34

23 And let me submit to you something else that Mr. 03:32:35  
24 Oster asked Ms. Mausser about. He kept asking her -- 03:32:38  
25 let me rephrase that, he said to her, something about 03:32:42

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1 the recession, I hope you don't lose your job, but can  
2 you imagine the parole board who let Von Clark Davis  
3 out on the first parole? They serve at the discretion  
4 of the director. The day they let Von Clark Davis out  
5 as a majority board, is the day a clean slate of parole  
6 board members come in. That is not going happen. 30  
7 to life for Von Clark Davis is life without the  
8 possibility of parole. It is a natural death in  
9 prison.

10 Dr. Smith didn't provide you mumbo jumbo. He gave  
11 you the specifics as to why he came up with the  
12 borderline disorder diagnosis, why he came up with the  
13 substance abuse, alcoholic dependence disorder, and it  
14 is laid out for him in the records. He didn't have to  
15 believe Mr. Davis. He didn't have to believe any of  
16 the family members or any of the summaries he reviewed  
17 of people who were no longer available, it is in the  
18 records, all the way back to the Navy, and every record  
19 thereafter. It is in the records. So he didn't make  
20 something up. He is not hired gun, who didn't just  
21 come up with some excuse. He gave an explanation.

22 Mitigating factors are explanations, not excuses  
23 or justifications. Every one has a history that molds  
24 them. I'm here because of my life experiences. You  
25 are in those black robes because of your life

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1	experiences. Von Clark Davis became the man he did	03:34:08
2	before Charles Tipton came into that family. Dr. Smith	03:34:12
3	phrased it something like, that was his one last hope,	03:34:21
4	but he came too late. And I asked him, but how do you	03:34:22
5	differentiate the other kids in this family? Elliot,	03:34:28
6	the oldest brother, Carol is the child after Victor,	03:34:32
7	I'm sorry, after Von, and then you have Charles who is	03:34:36
8	deceased, but then you have Victor. And I covered	03:34:40
9	this. Victor you heard and some of you knew him. You	03:34:44
10	must have been thinking to yourself, Victor Davis made	03:34:48
11	it, he made something great out of himself. He is an	03:34:52
12	activist in the community. He's done very well. He	03:34:56
13	has gone onto school. What differentiates him from the	03:34:58
14	man who has killed two women? The difference was very	03:35:03
15	clear and Victor covered it, he was our first witness.	03:35:06
16	He spent 75 percent of his time with his grandmother.	03:35:09
17	That was a big part. Grandmother provided that	03:35:14
18	stability that Von Clark didn't have. He was the	03:35:18
19	favorite. Now, I know Carol, the sister said, well,	03:35:22
20	you know, everybody thinks they are the favorite. But	03:35:25
21	Victor told you that his mother would sometimes use as	03:35:29
22	a warning that if he acted up, she was going to bring	03:35:34
23	him back to live with her and the rest of the kids	03:35:37
24	rather than staying with grandma. Grandma was the best	03:35:40
25	possible place to be apparently because why would it be	03:35:43

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1	a threat to bring him back home to live with the rest	03:35:47
2	of the family?	03:35:50
3	The order of birth is really important, too,	03:35:53
4	because Nick Davis isn't really in the picture when	03:35:55
5	Victor, yes, he is born because he is Nick Davis'	03:36:00
6	child, but the siblings after him, one of them is not	03:36:04
7	Nick's child. The mom is not with Nick, he is in and	03:36:08
8	out of the family, but he was already gone basically by	03:36:15
9	the time Victor was born, so he really doesn't know him	03:36:19
10	at all versus Von who seeks out his father. A man who	03:36:23
11	you would wonder why you would seek out when you never	03:36:27
12	had a relationship with him before but because he had	03:36:30
13	some vague memories of him. More so even Carol said	03:36:32
14	she had some vague memories, versus Victor whose	03:36:35
15	younger than Carol said I don't really remember my dad	03:36:38
16	except for the one time they made me go see him. It's	03:36:42
17	a case like this that makes me realize in my own	03:36:46
18	personal life that every day is a chance to mold a	03:36:51
19	child's life. Every day. Everything I do with my own	03:36:56
20	child and everything that all of my client's, domestic	03:36:59
21	relations and criminal clients do with their children	03:37:04
22	is a chance to mold that child, to be the child that	03:37:07
23	stands next to me as my next criminal client or the	03:37:10
24	client that I never see, ever.	03:37:13
25	Age of abandonment, encouragement support that you	03:37:22

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1 received, birth order, those are some really important 03:37:25  
2 things that Dr. Smith talked about. I don't think it 03:37:29  
3 is disputed but maybe it is, but bipolar disorder 03:37:42  
4 that -- I'm sorry. Borderline personality disorder 03:37:48  
5 that Dr. Smith testified to, he said that Von meets 03:37:50  
6 eight of those nine factors, symptoms. You only needed 03:37:56  
7 five of them to meet borderline personality disorder, 03:38:01  
8 but he has eight of them. And these aren't things that 03:38:06  
9 Von threw out at him, and said, oh, this is what I 03:38:09  
10 have. This is what I have. These are things he 03:38:11  
11 gleaned from records, interviews and pulling it from 03:38:13  
12 Von. Von did not want to cooperate; there is nothing 03:38:16  
13 wrong with me, I don't have any problems. 03:38:19

14 One of the things that I thought was very 03:38:26  
15 interesting, and it kind of goes along with Victor is 03:38:29  
16 that Victor apparently had a very close relationship 03:38:31  
17 with his grandmother. I believe he said he lived with 03:38:34  
18 her until her death until 1986. The family all 03:38:37  
19 testified that they were close. They did. But then 03:38:43  
20 when you delved into it deeper, what does close mean to 03:38:46  
21 you? Well, we went fishing together. Great. You had 03:38:52  
22 fishing experiences, you know, you talked about your 03:38:57  
23 life and your feelings and things going on. Remember 03:38:59  
24 Charles Tipton's testimony when I asked him about that? 03:39:02  
25 I said, well, what did you guys talk about? Did you 03:39:06

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1 talk about personal things? He almost seemed offended,  
2 oh, we wouldn't talk about anything personal, we just  
3 talked about fishing. That was it. That is not a  
4 close family. That is a family that has put up  
5 borders. That is a family that just on the surface is  
6 close and they may have a big extended family, but it  
7 doesn't mean that you develop an attachment to people,  
8 that you develop well as a child. And exhibit A in  
9 that is Von Clark Davis. That didn't happen in this  
10 particular child.

11 We submit to you that the mitigating factors  
12 include his family and his friends, the people that  
13 testified to you. Victor Davis, Carol Davis, Charles  
14 Tipton, Alluster Tipton, Fran Welland, friends Jerome  
15 Stineman, Rick Rotundo they gave you some snapshots  
16 into him. He has not been idle in 25 years while he  
17 sat on death row. He has also been good as the report  
18 -- as the exhibit, Mr. Nowack testified to.

19 It would be very common on a capital case to bring  
20 in your family members to show the love and support.  
21 That would be common. What I think is extraordinary is  
22 that his daughter, Sherry Davis, a victim in this case,  
23 because she is the daughter of Ernestine Davis, in  
24 those 25 years that Von has fought this death penalty  
25 previously imposed, the last 15 years he has had a

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1 relationship with Sherry Davis. That is extraordinary  
2 that she could forgive and mount that hill of hope and  
3 despair and grief.

4 Von gave you his unsworn statement. I am not  
5 going to paraphrase it because he gave it best to you  
6 and that is why he came first. Summary is he is an  
7 awful person, he put grief in the lives of three  
8 families, and he can't change his actions. He is not  
9 asking that this Court let him go. He is taking full  
10 responsibility for his actions. And yes, it may seem  
11 late because this isn't the trial of 1984, but he is  
12 asking and we are asking that you impose a sentence of  
13 30 to life. He does not want to die nor does hardly  
14 any other person I have ever represented. But he does  
15 not want to die and he asks and I can ask you to  
16 consider that as a mitigating factor.

17 We submit that the aggravating circumstances in  
18 this case do not outweigh the mitigating factors  
19 presented by proof beyond a reasonable doubt. We  
20 submit that the proper sentence to impose in this case  
21 is 30 to life, because that is life without the  
22 possibility of parole for this defendant sitting before  
23 you. Thank you.

24 JUDGE NASTOFF: Thank you, Ms. Cook-Reich. Before  
25 you sit down and before I hear from the defense, I

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1 would just like to insure that I have the -- an 03:42:35  
2 accurate list of the specific mitigating factors that 03:42:43  
3 you are asking the Court to consider. And what I have 03:42:47  
4 are support and love of family and friends, his being 03:42:50  
5 raised in a dysfunctional environment, which I believe 03:42:59  
6 is the term that was used in opening by Mr. Porter, the 03:43:02  
7 testimony from Dr. Smith about the mental health impact 03:43:06  
8 that that had upon him, specifically the borderline 03:43:10  
9 personality disorder and the substance abuse disorder, 03:43:15  
10 correct? 03:43:19

11 MS. COOK-REICH: Yes, Your Honor. 03:43:19

12 JUDGE NASTOFF: Is remorse or apology that he 03:43:21  
13 offered in his unsworn statement that was communicated 03:43:26  
14 through other witnesses, his good behavior in prison, 03:43:29  
15 his age of 62, the likelihood that he would not be 03:43:34  
16 released on parole, there was some representation in 03:43:44  
17 the opening statement that a life sentence would give 03:43:56  
18 closure to the victim's family, I believe that was 03:44:01  
19 offered, and essentially I believe there was an 03:44:03  
20 argument on a cost savings to taxpayers to end the 03:44:06  
21 litigation, and I just want to make sure that I haven't 03:44:11  
22 missed any. 03:44:16

23 I understand that the Court is not limited to the 03:44:18  
24 specific mitigating factors that have been described, 03:44:25  
25 that the Court can consider any other mitigating 03:44:28

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1 factors. I am reading that from jury instructions that 03:44:31  
2 I have used in capital cases that I would instruct a 03:44:32  
3 jury, but at a minimum I want to make sure that I have 03:44:35  
4 an accurate list of the specific mitigating factors 03:44:39  
5 that you are presenting. Is my list comprehensive, or 03:44:42  
6 am I missing anything? 03:44:45

7 MS. COOK-REICH: We would ask for one more, Your 03:45:19  
8 Honor, that the daughter of the aggravated circumstance 03:45:20  
9 in this case, has formed a bond with Mr. Davis and asks 03:45:23  
10 this Court for a life sentence. 03:45:29

11 JUDGE NASTOFF: So the testimony of Sherry Davis? 03:45:31

12 MS. COOK-REICH: Yes, Your Honor. 03:45:33

13 JUDGE NASTOFF: Thank you, counsel. 03:45:41

14 MS. COOK-REICH: Thank you, Your Honor. 03:45:42

15 JUDGE NASTOFF: State's rebuttal? 03:45:44

16 MR. OSTER: May it please the Court, Mr. Eichel, 03:45:46  
17 Ms. Cook-Reich, Mr. Porter, Mr. Davis, Your Honors, the 03:46:07  
18 simple and undeniable fact of this case is that the 03:46:12  
19 aggravating circumstance outweighs the mitigating 03:46:16  
20 factors beyond a reasonable doubt. Period. Simple. 03:46:21

21 I would like to start by addressing some things 03:46:29  
22 that were just said by defense counsel before going 03:46:33  
23 into my full summation. I would like to address a 03:46:35  
24 couple of things. The first is in 1983, 1984, there is 03:46:39  
25 no such thing as life without the possibility of 03:46:45

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1 parole. Defense counsel wanted to make an analogy, but 03:46:48  
2 there simply is no such sentencing option as life 03:46:53  
3 without the possibility of parole. Life to 30 is not, 03:46:57  
4 cannot be, was never stated to this Court that it could 03:47:04  
5 be guaranteed, and is not an option as life without the 03:47:08  
6 opportunity of parole. 03:47:13

7 Ms. Cook-Reich discussed my cross-examination of 03:47:17  
8 Ms. Mausser from the parole board. Ms. Mausser said 03:47:21  
9 that no parole board member could make that statement. 03:47:26  
10 She said she could not make a statement of when, if, 03:47:29  
11 how Mr. Davis could be paroled. She said that -- and 03:47:32  
12 Ms. Cook-Reich brought up to this Court that he would 03:47:42  
13 spend a large portion of his adult life in prison. 03:47:45  
14 That has been done, Your Honors. That has been done. 03:47:48  
15 He is not likely on the first opportunity I believe was 03:47:52  
16 what Ms. Cook-Reich said, but when I asked Ms. Mausser 03:47:56  
17 when is the next opportunity? She said it could be in 03:48:01  
18 a year. I said, so what about the next? A year after 03:48:03  
19 that? Yes. A year after? Yes. So not the first, but 03:48:05  
20 a year later? Possible. The next year? Possible. 03:48:11

21 Ms. Cook-Reich said and made an analogy to the 03:48:18  
22 prosecutor standing in front of you in a normal case 03:48:22  
23 telling you about what the defendant has done, if you 03:48:25  
24 were going to impose sentence and contrasted that with 03:48:29  
25 the parole board. Except there is a problem with that. 03:48:31

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1 And the problem is in Ms. Mausser's own words that she 03:48:35  
2 admitted to me during cross-examination when I asked 03:48:39  
3 her about a quote that she gave, her words are that it 03:48:43  
4 is her belief that due to the benefit of the 03:48:49  
5 information and we went through all of the different 03:48:54  
6 information the parole board gets, that they are in a 03:48:58  
7 better position then, and I asked her prosecutor's? 03:49:00  
8 Yes. Judges? Yes. Family members of the victim? 03:49:04  
9 Yes. That they believe they are in a better position 03:49:12  
10 because of that information than a prosecutor standing 03:49:14  
11 there, a victim's family member standing there, or a 03:49:19  
12 judge who would come in front of them and say this 03:49:21  
13 person should not be paroled. She stated that clearly 03:49:23  
14 to us. So the analogy, the analogy has the bottom fall 03:49:29  
15 out of it because that is not the truth of what a 03:49:36  
16 parole board would be like and that analogy cannot hold 03:49:38  
17 water. 03:49:42

18 She also in that quote said that the prosecutors 03:49:42  
19 often times see the person as they did at the time of 03:49:46  
20 conviction. That is not, I don't believe a reason why 03:49:49  
21 a statement should not be taken for its meaning. And I 03:49:54  
22 think maybe it should be taken for its meaning. 03:50:01

23 Ms. Cook-Reich also discussed Victor Davis. I 03:50:05  
24 believe she asked the question, what differentiates him 03:50:11  
25 from the man that killed two women? I would say the 03:50:14

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1       last six words; the man that killed two women. And 03:50:19  
2       cannot forgotten. The man that killed two women. 03:50:24  
3       Those six words, that answers that question. 03:50:30

4               In discussing Dr. Smith, borderline personality 03:50:36  
5       disorder, couple of the things Dr. Smith discussed, a 03:50:42  
6       person can be immature, lack of impulse control, 03:50:46  
7       inappropriate and intense anger, recurrent physical 03:50:50  
8       fights. Your Honors, that is a person who is a danger. 03:50:56  
9       Who is a danger. There is no such vehicle as life 03:51:03  
10       without the possibility of parole in 1984. 03:51:11

11              Your Honors, the law will be the guide here today. 03:51:21  
12       The law is simply a system of rules enforced through 03:51:25  
13       the institutions, such as we have here that are used to 03:51:30  
14       underpin civil obedience in society. In 350 BC 03:51:33  
15       Aristotle said that the law and the rule of law is 03:51:41  
16       better than any one individual. That is an important 03:51:45  
17       statement. The law, as we have it here, to weigh those 03:51:45  
18       circumstances and determine that (A)(5) aggravated 03:51:48  
19       circumstance outweighs is more important and must be 03:51:52  
20       given weight, instead of just swept under a rug because 03:51:58  
21       of convenience or any other factor; comfort, ease of 03:52:03  
22       decision. The rule of law is better than the rule of 03:52:07  
23       any individual. 03:52:10

24              Now, oftentimes, it is thought of that the law may 03:52:15  
25       have an ill-will toward a person, may disfavor, but as 03:52:24

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1 the rule of law is stated in black and white, the rule  
2 of law has no ill-will toward any person. It is  
3 applied of equal force to those people who come in  
4 conflict with it, and if it is done that way, justice  
5 can be found.

6 I have heard the analogy a couple of times that if  
7 you imagine that there is a locomotive and it is called  
8 the law, it rides itself down the tracks, the tracks of  
9 truth. It goes to a small town. What is important is  
10 that that small town shouldn't be called compromise,  
11 the small town shouldn't be called convenience, the  
12 small town shouldn't be called comfort. That small  
13 town must be justice where that locomotive arrives.

14 In searching for that justice, I call upon this  
15 panel for justice in the fullest measure. Justice is  
16 more than a heart-lead compromise. It is the  
17 ascertain, and declaration of the truth. This decision  
18 is not an easy decision to be made, but I suggest to  
19 use the law and justice as a shield in this case, to  
20 find what the truth is, the defendant's statement and  
21 Ms. Cook-Reich brought it up, very simply all I want to  
22 say about the defendant's statement is it was not made  
23 under oath to you.

24 Ms. Cook-Reich mentioned a lot of different things  
25 to you and we have talked about the weighing process

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1 and I don't want to go over law that this Court is 03:54:35  
2 fully aware of, but it is worth mentioning, I believe, 03:54:39  
3 that in that weighing process, the aggravating 03:54:42  
4 circumstance must outweigh beyond a reasonable doubt 03:54:46  
5 the mitigating factor, but not by a great amount. Can 03:54:50  
6 it be a small amount? Can it be very slight? Yes. As 03:54:55  
7 long as that aggravating circumstance outweighs beyond 03:55:01  
8 a reasonable doubt the mitigating factors, it can be 03:55:06  
9 slight, that outweigh beyond a reasonable doubt. That 03:55:11  
10 is enough. 03:55:14

11 In looking at the evidence of mitigation that is 03:55:19  
12 before this Court, I think that an interesting way to 03:55:24  
13 look at this and partly in rebuttal of what the defense 03:55:29  
14 is argued is, looking at the typical version of the 03:55:34  
15 atypical. We talk about support and love from family 03:55:39  
16 members. Your Honors, that is typical. Being typical, 03:55:43  
17 the State would argue it deserves very little weight in 03:55:50  
18 mitigation. Support from a pen pal who you have been 03:55:55  
19 writing to is typical, deserves very little weight. 03:55:58  
20 Testimony by, I believe it is fair to characterize an 03:56:03  
21 admitted alcoholic who is leading AA groups, who takes 03:56:11  
22 a liking to one of his students, is typical. Typical 03:56:15  
23 should be given little weight. A good prison record on 03:56:20  
24 death row, Scott Nowack testified death row inmates 03:56:25  
25 receive fewer write-ups than the general population. 03:56:29

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1 He testified in his experience that is typically what 03:56:35  
2 he sees. Good behavior on death row through Mr. 03:56:38  
3 Nowack's testimony is typical. Again, entitled to 03:56:46  
4 little weight. What I believe and I would argue to 03:56:50  
5 this Court -- I strike that I believe -- I would argue 03:56:58  
6 to this Court what is atypical is for a person during 03:57:03  
7 their lifetime to have purposely killed two women. 03:57:08  
8 That is atypical. The atypical in this case, that 03:57:16  
9 aggravating circumstance, outweighs all of the typical 03:57:23  
10 things that you would expect that have been presented 03:57:31  
11 to us in mitigation. 03:57:34

12 In discussion a couple of minutes ago, there was 03:57:37  
13 11 items I believe that the defense has stated we 03:57:41  
14 should look at in mitigation. And we are dealing with 03:57:47  
15 a weighing process, but I am struck by a kid's game. I 03:57:50  
16 am struck by a kid's game where they come up to you and 03:57:59  
17 they offer you let's say 11 nickels. I will give you 03:58:04  
18 these 11 nickels, and there is 11, and I will give you 03:58:09  
19 these 11 nickels. You give me that one \$10.00 bill. I 03:58:11  
20 will give you these 11 nickels, just that one \$10.00 03:58:16  
21 bill. And the reason we know it is a kid's game is 03:58:22  
22 because when reason, logic, the truth of the value, the 03:58:24  
23 quality of those items is weighed, a \$10.00 bill is 03:58:31  
24 much greater than those 11 nickels. 03:58:40

25 Mr. Porter, during opening comment, opening 03:58:55

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1 statement, said that his theme throughout these 03:59:00  
2 proceedings would be that there is no real impact in 03:59:05  
3 this case. And I think that that theme is continued by 03:59:12  
4 Ms. Cook-Reich continuing to argue to the Court that 03:59:16  
5 there is life without the possibility of parole in this 03:59:21  
6 case. But respectfully have to disagree that there is 03:59:25  
7 no real impact. Respectfully argue that doing the 03:59:33  
8 right thing has an impact. Following the law has an 03:59:41  
9 impact. Chasing down justice over years and years to 03:59:46  
10 making sure that justice prevails has an impact. It 03:59:54  
11 must. And justice may be slow. It may appear to grind 04:00:01  
12 to a halt at times. It may be elusive. It may be 04:00:08  
13 frustrating. It may even appear easier at times to 04:00:12  
14 sweep justice under a rug. But Your Honors, justice is 04:00:17  
15 what we must aspire to. Justice is that mountain top 04:00:24  
16 of human existence that we must get to. Once on the 04:00:30  
17 top of that, is only when we can truly see, no matter 04:00:35  
18 how slow, no matter how difficult, no matter how 04:00:39  
19 painful, justice must be found. Because justice, Your 04:00:43  
20 Honors, has an impact. 04:00:51

21 In this case, there is only one verdict that is 04:00:56  
22 just. The lives of two women outweigh beyond a 04:01:02  
23 reasonable doubt under the (A)(5) factor all mitigation 04:01:11  
24 that has been brought before this Court. And for that 04:01:17  
25 reason, the law and justice require that the penalty of 04:01:22

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1 death be imposed. Thank you. 04:01:31

2 JUDGE NASTOFF: Thank you, Mr. Oster. All right. 04:01:34  
3 Counsel. We are going to retire to begin our 04:01:40  
4 deliberations in this matter. 04:01:45

5 (Judges confer off the record.) 04:01:52

6 JUDGE NASTOFF: All right. Judge Spaeth raises an 04:02:10  
7 issue, which I think is something that we would seek 04:02:12  
8 some clarification on first. Early on in the case, the 04:02:15  
9 defense requested that we not review certain portions 04:02:22  
10 of the previous transcripts and part of that was the 04:02:24  
11 sentencing that originally transpired in the case. 04:02:27  
12 There have been some representations that have been 04:02:30  
13 made about how the weapons under disability charge was 04:02:34  
14 dealt with, but none of that is before us. We are 04:02:37  
15 seeking some clarification. 04:02:40

16 My understanding based on the order from the 04:02:43  
17 District Court and from the decision of the 6th Circuit 04:02:46  
18 is that the only matter before us is the resentencing 04:02:51  
19 on the aggravated murder with the (A)(5) spec; is that 04:02:57  
20 everyone's understanding? 04:03:04

21 MR. EICHEL: Yes, Your Honor, that is our 04:03:06  
22 position. No -- 04:03:08

23 JUDGE NASTOFF: I saw no reference to it in the 04:03:12  
24 order from the District Court. 04:03:17

25 MR. EICHEL: All of the Court's decisions had 04:03:18

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1	nothing to do with the conviction for the other offense	04:03:21
2	stated in this indictment. And it is not before the	04:03:24
3	Court.	04:03:26
4	JUDGE NASTOFF: And has that sentence been served?	04:03:27
5	MR. EICHEL: To the extent that it is there, I	04:03:31
6	suppose, yes.	04:03:35
7	JUDGE NASTOFF: Was it imposed consecutively	04:03:37
8	originally?	04:03:40
9	MS. COOK-REICH: Yes.	04:03:41
10	MR. PORTER: Yes.	04:03:42
11	MR. EICHEL: Well, I disagree with that, because	04:03:43
12	there is no possibility of running a term sentence	04:03:45
13	consecutive to a sentence of death. It is not	04:03:47
14	consecutive to anything right now.	04:03:51
15	JUDGE NASTOFF: Okay.	04:03:53
16	MR. EICHEL: It is there. It is a year and a half	04:03:55
17	and it is there.	04:03:58
18	JUDGE NASTOFF: All right.	04:03:59
19	JUDGE PATER: I guess the question behind that	04:04:00
20	question, maybe the State wants to respond to it. It	04:04:02
21	seems that the defense has proposed an interpretation	04:04:05
22	that if this sentence is changed -- or not changed. It	04:04:08
23	is a resentencing, so we are starting from scratch	04:04:13
24	basically. If we determine that the proper sentence is	04:04:17
25	life with the possibility of parole after 30 years,	04:04:18

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1       then does the State concur with what seems to be       04:04:20  
2       defense's position that at that point, if the murder       04:04:24  
3       sentence was 30 to life, that the other sentence would       04:04:31  
4       necessarily run consecutive to the new sentence, if you       04:04:35  
5       will? And have I understood defense correctly? Is       04:04:40  
6       that your position?       04:04:44

7               MR. PORTER: Could I just confer with counsel for       04:04:46  
8       a minute? I don't mean any disrespect, Your Honor.       04:04:48

9               JUDGE NASTOFF: We are looking for some direction       04:04:50  
10       since that has not been something -- information that       04:04:52  
11       has been provided to us.       04:04:53

12               (Defense counsel confer off the record.)       04:04:58

13               JUDGE PATER: Did I state defense's position       04:05:05  
14       correctly?       04:05:07

15               MR. PORTER: I think that has been our position,       04:05:08  
16       yes. I think -- and I may have overstated it slightly,       04:05:10  
17       so I am trying to correct myself and certainly did not       04:05:14  
18       mean to mislead the Court. I think if the Court       04:05:18  
19       imposes a sentence of less than death, it has the       04:05:21  
20       ability to impose a consecutive sentence, and that is       04:05:26  
21       somewhat what we have argued and I guess I made that       04:05:30  
22       assumption.       04:05:33

23               JUDGE PATER: Your position is that we would have       04:05:33  
24       to get to that other charge as well, that other count?       04:05:36

25               MS. COOK-REICH: I believe it is our position that       04:05:41

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1 as the last sentencing court, just like if you had 04:05:43  
2 two -- 04:05:46

3 JUDGE NASTOFF: We could run this sentence 04:05:46  
4 consecutive to that? 04:05:49

5 MS. COOK-REICH: -- consecutive that, yes. 04:05:49

6 MR. PORTER: And the only -- and again, I don't do 04:05:52  
7 any capital work, so I am probably putting my foot in 04:05:56  
8 my mouth. I am wondering given the law in effect then 04:05:59  
9 of whether that sentence would have to be served as a 04:06:04  
10 matter of law consecutively or not. 04:06:05

11 MR. EICHEL: Your Honors, the answer to that 04:06:09  
12 question is no, it is not required to be consecutive. 04:06:10  
13 However, and I have case citation, *State vs. Watson*, a 04:06:15  
14 Butler County decision, was reversed by the Supreme 04:06:19  
15 Court, sent back for resentencing on the capital 04:06:23  
16 offense and under that circumstance it was a jury trial 04:06:26  
17 so it had to be heard by a single judge and it had to 04:06:29  
18 be a life sentence. 04:06:34

19 The question raised on the appeal from that 04:06:36  
20 sentence whether the Judge could impose the life 04:06:39  
21 sentence consecutive to an already existing undisturbed 04:06:43  
22 sentence of some years on an aggravated robbery 04:06:50  
23 involved in that case, which was undisturbed by the 04:06:57  
24 overturning of the death sentence. 04:07:01

25 JUDGE NASTOFF: The answer was? 04:07:02

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1 MR. EICHEL: It was ruled that the Court impose 04:07:04  
2 consecutive. They had that discretion. 04:07:07

3 JUDGE PATER: Let me clarify for myself. Is this 04:07:11  
4 where we are: Do we have agreement between the two 04:07:15  
5 sides that if the sentence we were to come up with for 04:07:18  
6 the aggravated murder charge was to be life with the 04:07:22  
7 possibility of parole after 30 years, if we did that, 04:07:28  
8 then if that is all we stated, that the other -- is it 04:07:31  
9 a one year sentence? 04:07:35

10 JUDGE NASTOFF: One and a half. 04:07:36

11 JUDGE PATER: That that would automatically run 04:07:39  
12 concurrently if we were mute, but that would have the 04:07:42  
13 discretion to go forward and to bring that back up 04:07:46  
14 again and to address that? 04:07:49

15 JUDGE NASTOFF: No. We could impose our sentence 04:07:51  
16 either concurrent or consecutive to the already imposed 04:07:54  
17 sentence. 04:07:56

18 JUDGE PATER: I didn't mean readdress as to the 04:07:57  
19 one and a half. I meant readdress as to whether it 04:07:59  
20 would be consecutive or concurrent. 04:08:02

21 MS. COOK-REICH: I believe if you are mute, it 04:08:05  
22 would be concurrent, but if you were vocal and you say 04:08:06  
23 the word consecutive, it runs consecutive. 04:08:08

24 JUDGE PATER: And defense agrees that we could be 04:08:12  
25 vocal, but we are not precluded from doing that? 04:08:15

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1 MS. COOK-REICH: Yes, Your Honor. You are the 04:08:16  
2 last sentencing court. 04:08:17

3 MR. EICHEL: Precisely. 04:08:20

4 JUDGE NASTOFF: Thank you. We will be retiring to 04:08:20  
5 deliberate, and we will summon you with any updates as 04:08:23  
6 to whether we have either reached a decision or if we 04:08:27  
7 are going to retire for the evening if we haven't 04:08:30  
8 reached a decision yet. 04:08:31

9 (Three-judge panel retired for deliberations at 04:08:34  
10 4:08 p.m.) 04:08:45

11 THE COURT: All right. We are back on record in  
12 State of Ohio vs. Von Clark Davis, CR83-12-0614. The  
13 defendant is present with counsel, Randall Porter and  
14 Melynda Cook-Reich. The State's representatives, Dan  
15 Eichel and Mike Oster are also present as are all three  
16 members of the panel. The panel has deliberated and  
17 has reached a verdict in this matter and have reduced  
18 that to writing. At this time, will the defendant and  
19 counsel please rise?

20 We, the panel of Judges, having been duly  
21 impaneled to hear this case, do hereby find the  
22 aggravating circumstance that the defendant was found  
23 guilty of committing outweighs the mitigating factors  
24 presented in this case by proof beyond a reasonable  
25 doubt and hereby imposes on the defendant, Von Clark

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1 Davis, the sentence of death. Judge Pater, do you  
2 concur in this opinion?

3 JUDGE PATER: I concur.

4 JUDGE NASTOFF: Judge Spaeth, do you concur in  
5 this opinion?

6 JUDGE SPAETH: I do.

7 JUDGE NASTOFF: And I concur as well. You may be  
8 seated. Mr. Davis, you have a right of appeal. You  
9 have a right to have transcripts prepared of these  
10 proceedings and if you are indigent, and you cannot pay  
11 for them yourself, the Court can provide them at no  
12 cost to you. You have a right to have counsel to  
13 represent you in your appeal and if you cannot afford  
14 counsel, this Court can appoint counsel at no cost to  
15 you as well.

16 A sentencing opinion reflecting this Court's  
17 findings will be prepared and filed in accordance with  
18 Ohio Revised Code Section 2929.03(F). I believe the  
19 statute calls for an opinion to be filed with the Court  
20 of Appeals and the Supreme Court with 15 days and the  
21 Court will comply with that statutory provision.

22 Counsel, is there anything further that we need to take  
23 up at this time before we adjourn? From the State?

24 MR. OSTER: Your Honor, some members of the family  
25 are present and we would ask -- they have indicated to

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1 us they would like to address the Court. We would ask  
2 for them to be given that opportunity.

3 JUDGE NASTOFF: Well, a sentence has been  
4 rendered. I'm not sure...the sentence has been  
5 rendered in the case reflecting the Court's findings.  
6 I don't think that we are going to honor that request  
7 at this time. Anything further from the defense?

8 MS. COOK-REICH: Your Honor, we would ask that the  
9 Court appoint counsel for Mr. Von Clark Davis.  
10 Obviously, he is indigent. He has been on death row  
11 for 25 years. Whether the Court appoints from our own  
12 county or not, he does need that counsel appointment.

13 JUDGE NASTOFF: All right. Do either of you  
14 anticipate being counsel for purposes of the appeal?

15 MR. PORTER: We ask that new counsel be appointed  
16 so the ineffectiveness challenge can be made on direct  
17 appeal as appropriate.

18 JUDGE NASTOFF: All right. Upon the filing of the  
19 notice of appeal, the Court will address that matter  
20 forthwith. If there is nothing further, then, we are  
21 adjourned.

22 (Proceedings adjourned in this matter at 5:10  
23 p.m.)  
24  
25

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1  
2 STATE OF OHIO )  
3 ) SS. REPORTER'S CERTIFICATE  
4 COUNTY OF BUTLER )

5 I Jill M. Cutter, RPR, do hereby certify that I am  
6 a Registered Professional Reporter and Notary Public within  
7 the State of Ohio.

8 I further certify that these proceedings were  
9 taken in shorthand by me and by electronic means at the time  
10 and place herein set forth and was thereafter reduced to  
11 typewritten form, and that the foregoing constitutes a true  
12 and accurate transcript, all done to the best of my skill and  
13 ability.

14 I further certify that I am not related to any of  
15 the parties hereto, nor am I in any way interested in the  
16 result of the action hereof.

17 Dated at Hamilton, Ohio, this 22 day of December,  
18 2009.

19  
20   
21 Jill M. Cutter, RPR  
22 Official Court Reporter  
23 Butler County Common Pleas  
24 Hamilton, Ohio 45011  
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JAN 08 2013

IN THE COURT OF COMMON PLEAS  
BUTLER COUNTY, OHIO  
CINDY CARPENTER  
CLERK OF COURTS

CINDY CARPENTER  
CLERK OF COURTS

STATE OF OHIO,

\* CASE NO: CA09-10-0263

\* CR83-12-0614

Plaintiff,

vs.

VON CLARK DAVIS,

Defendant.

FILED BUTLER CO.  
COURT OF APPEALS

JAN 06 2013  
JAN 08 2013

CINDY CARPENTER  
CLERK OF COURTS

**NOTICE OF FILING OF  
COMPLETE TRANSCRIPTION  
OF ALL PROCEEDINGS**

The Clerk of this Court is hereby notified of the filing of transcripts of all proceedings. Please cause issuance of notice of complete record to all parties, pursuant to App. R. 11(B), Filing of the Record.

Notice from Mary L. Swain <sup>m28</sup>  
Butler County Official Court Reporter